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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 635

HERBERT TIGNER, APPELLANT,

vs.

THE STATE OF TEXAS

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

FILED JANUARY 11, 1940.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

IN CRIMINAL DISTRICT COURT NO. 2 OF HARRIS COUNTY, TEXAS

No. 43974

THE STATE OF TEXAS

vs.

Ex Parte HERBERT TIGNER

Habeas Corpus for Release Being Held on Indictment for Violation of Anti-Trust Laws

[fol. 2] INDICTMENT—Filed June 25, 1937

In the Name and by Authority of the State of Texas:

The Grand Jury of Harris County, State of Texas, duly organized at the May Term, A. D. 1937, of Criminal District Court No. 2, of said county, in said court, at said term, do present that

Fred H. Tinch, C. H. Valentine, Herbert Tigner and J. Earl Hogue, on or about the 31st day of May, A. D. 1937, in said county and state, did then and there unlawfully engage with each other and among themselves in a conspiracy against trade and then and there unlawfully created a trust and then and there unlawfully by a combination of capital, skill and acts engaged with each other and among themselves for the purpose and effect to create and carry out restrictions in trade, to-wit: in the sale, trade, and purchase of beer, a commodity, and for the purpose and effect to prevent competition, and in the sale, trade, purchase, and delivery of beer, a commodity; and for the purpose and effect to fix at a certain standard and figure, the price of beer whereby the price of beer to the public in said Harris County, Texas, would be controlled and established, and the said Fred H. Tinch, C. H. Valentine, Herbert Tigner, and J. Earl Hogue and others, did then and there unlawfully make and enter into a trust, combination, contract, agreement, pool, and obligation with each other and among themselves, by which they bound themselves not to sell, trade, deliver, and dispose of beer, a commodity, below a common standard figure, and to keep the price of said beer

at a fixed and graduated figure; and to establish and settle the price of said beer between the aforesaid defendants and [fol. 3] others for the purpose and effect of precluding a free and unrestricted competition among themselves and others in the sale of beer, and to pool, combine, and unite their interests in connection with the sale of said beer so that the price thereof would be affected.

And the Grand Jurors aforesaid, do further present in and to said Court, at said term, that Fred H. Tinch, C. H. Valentine, and J. Earl Hogue, on or about the 31st day of May, A. D., 1937, in said county and State, did then and there create, enter into, and become members of and parties to a pool, trust, agreement, confederation, and understanding with Herbert Tigner and others to regulate and fix the price of a commodity and merchandise, to-wit beer, at fifteen cents per bottle straight or two bottles for twenty-five cents, and to maintain said price of said beer when the said price had been so regulated and fixed at the said sum of fifteen cents per bottle straight or two bottles for twenty-five cents.

And the grand jurors aforesaid, do further present in and to said Court, at said term, that on or about the 31st day of May, A. D. 1937, in said county and State, Fred H. Tinch, C. H. Valentine, J. Earl Hogue, and Herbert Tigner, and many other individuals who were engaged in the retail sale of beer, met in said Harris County, Texas, and unlawfully organized themselves into a trust, combination, conspiracy, and confederation with each other and among themselves to control, fix, and maintain at a certain standard and figure the retail price of beer in Harris County, and that the purpose of said trust, conspiracy, combination, and agreement, was to organize said retail beer dealers into an agreement, combination, and trust, to be known as the Retail Beer Deal- [fol. 4] ers Association, for the purpose of fixing and maintaining a set price, standard, and figure whereby the price of beer was affected, controlled, and established, and transact other business collateral thereto, and for such other purposes and powers as should be necessary, that aside from the ostensible purposes already mentioned, the agreement, conspiracy, and trust were created and organized for the purpose of controlling the beer industry in Harris County, Texas, and that the aforesaid defendants and others did then and there unlawfully enter into and organize said agreement, conspiracy, trust, confederation, and combination known as the Retail Beer Dealers Association for the

purpose of, First, creating and carrying out restrictions in trade; Second, increasing the price of beer, the same being a commercial commodity; Third, preventing competition in the sale of beer; Fourth, fixing at a certain standard and figure the price of beer whereby prices to the public would be controlled and established; Fifth, binding themselves to sell, dispose of, and deliver beer at a fixed price, and to establish and settle the price of beer at a fixed price so as to preclude a free and unrestricted competition in the sale of beer, and for the purpose of pooling and combining their interests in the sale of beer in such a manner as that the price thereof would be affected, said beer being an article of trade and a commercial commodity; Sixth, to prevent the delivery and sale of beer to those retail beer dealers who failed and refused to join the said combination, to-wit: the Retail Beer Dealers Association; and Seventh, to control the manufacture, production, and transportation of beer in Harris County.

Against the peace and dignity of the State.

Jas. A. Hall, Foreman of the Grand Jury.

[fol. 5] And endorsed on the back thereof: No. 43916. The State of Texas vs. Fred H. Tinch, C. H. Valentine, J. Earl Hogue, and Herbert Tigner. Indictment. Violation of Anti-Trust Laws. Bail $1,000.00. Langston G. King, Judge.

Witnesses: E. H. Hill, Hill's Buffett, 620 Louisiana. John Garner, 2004 Main Street, Preston 5021. John Plainos, Heights Coffee Shop, 357 West 19th, T. 0638. A. R. Hazard, 4919 Main St., H. 0234. Vincent Navarro, 1804 Louisiana, Pr. 6408. E. L. Nanny, 6730 Navigation, W. 7020. George Barrett Bowman, 1207 Lamar, Pr. 6055. A. C. Thornton, and Tony Margoitta, Pr. 3181. City Police Officers, Pete Musachia, 1215 McKinney B. 30150. J. B. Jordan, 906 Preston, B. 30571. Robert Burns Brandt, 1015 San Jacinto, Pr. 5173. E. V. Leeka, 1616 North Main, B. 32769. M. T. Heredin, 1210 75th St., Joe Rice, Rice Food Market, 2826 White Oak Drive, T. 1082. J. S. Dinivan 2419 Yale, T. 0564. Paul Pavlides, 1206 Main St., C. 0943.

[fols. 6-8] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 9] In Criminal District Court of Harris County

No. 43,974

Petition for Writ of Habeas Corpus

To the Honorable Langston G. King, Judge of Said Court:

I, Herbert G. Tigner, am being unlawfully confined and restrained of my liberty at the County Jail of Houston, Harris County, Texas, by Norfleet Hill, Sheriff of Harris County, Texas, who holds me in custody; said confinement and restraint is by virtue of a capias and warrant of arrest, issued by the District Clerk of Harris County, Texas, to the said Sheriff, a copy of which are attached hereto and made a part hereof for all purposes; said capias and warrant of arrest were issued for the arrest of Herbert G. Tigner, your petitioner herein, on an indictment of your said Petitioner by the Grand Jury of Harris County, Texas, said indictment being Cause No. 43,916, now pending before this Honorable Court, a copy of which is attached hereto and made a part hereof for all purposes; said indictment charges and/or purports to charge violation of Title 19, Chapter 3 of the Penal Code of Texas, 1925, and charges and/or purports to charge violations of Articles 1632-33-34-35-36-37-38-39-40-41-42-43 and 44 of said Penal Code, the Articles contained in said Chapter 3, Title 19.

Your Petitioner would respectfully show the Court that said Chapter 3 of Title 19 and the aforesaid Articles of the Penal Code of 1925, violate and are contrary to the Constitution of the United States, and to Section 1 of the Fourteenth Amendment of said Constitution, which provides in part:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United [fol. 10] States and of the State wherein they reside. No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

in that the provisions of said statutes deny to persons coming under the provisions thereof the equal protection of the law. The aforesaid Chapter 3, Title 19, and the aforesaid Articles in said Chapter of the Penal Code of 1925, prohibit any combination of capitol, skill or acts by two or

more persons seeking to fix, regulate or affect competition or prices or to restrain trade or to create a monopoly and to do various things with which your Petitioner is charged and/or sought to be charged. Article 1642 of said Chapter of said Penal Code, however, directly provides in part:

"No provision of this law shall apply to agricultural products or livestock while in the hands of the producer or raiser . . . ."

The provisions of Article 1642 directly exempts a producer or raiser of agricultural products or livestocks from the provisions of said Chapter 3, Title 19 of the Penal Code and leaves such persons free and unmolested for doing the same acts that anyone selling or dealing in any other commodity is made a criminal for doing.

Your Petitioner would show the Court that said Chapter 3 of said Title 19 and the said Article 1632-44, inclusive, of the Penal Code of 1925, are unconstitutional, under the Constitution of the United States, and void and of no effect; and that they are no law at all; that Defendant is restrained of his liberty on an indictment based on the aforesaid unconstitutional laws; that said indictment is invalid and of no force and effect, and that your Petitioner is illegally restrained of his liberty.

[fol. 11] Your petitioner would further show the Court that said provisions, Title 19, Chapter 3, of the Penal Code, and the aforesaid Articles of said Chapter, to-wit: Articles 1632 to 1644, inclusive, of the Penal Code of 1925, are further unconstitutional under the Constitution of the State of Texas, in that they violate provisions of Article 1, Section 3, of the Constitution of the State of Texas, which provides as follows:

"All free men, when they form a social compact have equal rights and no man, or set of men, is entitled to exclusive, separate, public emoluments, or privileges, but in consideration of public services."

The provisions of Article 1642 of the Penal Code of 1925, quoted above, violate the aforesaid provisions of the Constitution of the State of Texas, in that said Article 1642, grants to the producer or raiser of agricultural products of livestock special emoluments and privileges not in consideration for public services.

Further your Petitioner would respectfully show the Court that Article 1644, of the Penal Code, a part of said Chapter 3, Title 19, Penal Code of 1925, provides as follows:

"The foregoing articles shall not be held to apply to any combination or combinations, association or associations of capital, or capital and persons, natural or artificial, formed for the purpose of limiting the production or consumption of labor's products, or for any other purpose in restraint of trade. Nothing herein contained shall be held to interfere with the terms and conditions of private contract with regard to the time of service, or other stipulations between employers and employees. Nothing herein shall be construed to repeal affect or diminish the force and effect of any statute now existing on the subject of trusts, conspira- [fol. 12] cies against trades, pools and monopolies."

And that such provisions, excluding combinations formed for the purpose of limiting the consumption or production of labor's products, from any of the provisions of the so-called anti-trust laws embodied in the aforesaid Chapter 3, Title 19 of the Penal Code of 1925, is also in violation of Section 1 of the Fourteenth Amendment of the United States Constitution, in that the provisions of said anti-trust law embodied in said Chapter 3, Title 19, seek to make a criminal of those who combine to limit the production or consumption of most products but directly exclude labor's products, and, therefore, denies to all citizens doing like acts equal protection of the law.

Said Article 1644 further violates the aforesaid Section 3 of Article 1 of the Constitution of the State of Texas in that it grants special privileges and emoluments to those dealing in labor's products.

Your Petitioner would further respectfully show the Court that the Penal Provisions of the aforesaid so-called anti-trust laws of the State of Texas, being Articles 1632 to 1644, inclusive, are rendered invalid by the Legislature through the enactment and various amendments of the cooperative marketing acts, the provisions of which are embodied in Title 93, Chapter 8, of the Revised Statutes 1925, being Articles 5737 to 5764, R. S. 1925, as variously amended subsequent to 1925, and the provisions of which, as amended, provide for the establishment of corporations and associations to set prices, affect prices, limit competition and to do many acts in regard to agricultural products which are prohibited as to other products by the aforesaid anti-trust

laws, Chapter 3, Title 19 of the Penal Code of 1925, and which said cooperative marketing act specifically exempts [fol. 13] such associations and corporations from the provisions of the anti-trust laws by Article 5762, Chapter 8, Title 93, R. S. 1925, and by such exemption directly violating Section 1 of the Fourteenth Amendment of the Constitution of the United States, and Section 3, Article 1, of the Constitution of the State of Texas.

Your Petitioner would further show the Court that if he is, as is alleged, in the aforesaid indictment against him, a member of any combination seeking to control, fix or regulate the retail price of beer, then your Petitioner is wrongfully indicted and illegally restrained of his liberty for the reason that the aforesaid retail beer dealers are laborers and workers in their places of business and work long hours therein at manual labor without rightful or just incomes for such labor, and without such income as will allow them to adequately support themselves or support their families and children in decent conditions; that any such combination, if any, even if it exists, for whatever purpose, or if it exists or existed for the purposes alleged in the aforesaid indictment, comes directly under the exemptions of the anti-trust laws, embodied in Article 1642, Penal Code 1925, providing:

"It shall be lawful for any person engaged in any kind of work or labor, manual or mental, or both, to associate with other persons to form trade unions, and other organizations, for the purpose of protecting themselves in their personal work, personal labor and personal services in their respective pursuits and employments."

And further, because any such association, if it exists, or existed, comes directly under the provisions of Article 1644, quoted above, of the Penal Code, an exception to the anti-trust laws;

Wherefore, I pray your honor to grant and issue a writ [fols. 14-18] of habeas corpus to have me, the said Herbert G. Tigner, forthwith brought before your honor to the end that I may be discharged from such illegal confinement and restraint.

Herbert G. Tigner.

Duly sworn to by Herbert G. Tigner. Jurat omitted in printing.

July 15, 1937. Granted, set for July 28, 1937.

Langston G. King, Presiding Judge.

[fols. 19-22] IN CRIMINAL DISTRICT COURT NO. 2 OF HARRIS COUNTY, TEXAS

No. 43974. Ex Parte Herbert Tigner

Statement of Facts

HEARING ON WRIT OF HABEAS CORPUS

Be it Remembered, that on hearing of the above numbered and entitled cause, in said court, at said term, the following proceedings were had before the Hon. Langston G. King, judge presiding, to-wit:

OFFER IN EVIDENCE

The State first offered and introduced in evidence indictment in this cause, it being agreed that said indictment was duly returned by the Grand Jury of Harris County, Texas, against Relator and others, and was duly filed with the District Clerk of Harris County, Texas, said indictment being as follows:

Indictment omitted. Printed side page 2 ante.

Job No. 6104 Supreme Court Record No. 635

[fol. 23] OFFER IN EVIDENCE

The State offered and introduced capias issued to the Sheriff of Harris County, Texas, ordering the arrest of Relator and others, reading as follows:

"IN THE CRIMINAL DISTRICT COURT NO. 2, HARRIS COUNTY, MAY TERM, A. D. 1937

No. 43916

THE STATE OF TEXAS, COUNTY OF HARRIS

The State of Texas to any sheriff in the State of Texas, Greeting:

You Are Hereby Commanded to arrest Fred H. Tinch, C. H. Valentine, J. Earl Hogue, Herbert Tigner, if he is to be found in your County, and him safely keep, or so provide that you have him before the Honorable Criminal District Court No. 2 in and for said County of Harris, at the Court House thereof in the City of Houston, on instanter and

then and there to answer the State of Texas upon indictment pending in said Court charging him with Violation of Anti Trust Laws, a Felony, filed in our said Criminal District Court No. 2 on the 25 day of June, A. D. 1937.

Herein fail not; but of this Writ then and there make due return, showing how you have executed the same.

Witness: J. W. Mills, Clerk of said Criminal District Court No. 2, and the seal thereof, this 25 day of June, A. D. 1937.

J. W. Mills, Clerk Criminal District Court No. 2, Harris County, Texas, by R. J. Lindley, Deputy." (Seal.)

[fol. 24] The return on the capias is as follows:

"Received this Writ on the 25 day of June, 1937, and I executed the same on the 26 day of June, 1937,

By accepting bond on Herbert Tigner—6-25; on Valentine on 6/26/37; J. E. Hogue & Fred H. Tinch producing to Court.

Norfleet Hill, Sheriff of Harris County, by W. G. Glover, Deputy."

AGREEMENT AS TO FURTHER FACTS

It was agreed by the State and Relator that the further facts are that Relator was surrendered on the appearance bond by his sureties, and was taken into custody by the Sheriff of Harris County, Texas; that thereafter writ of habeas corpus was issued while Relator was in custody; and Relator was by the Court granted bail from day to day and was released on habeas corpus bond pending hearing of said habeas corpus, now being had.

[fol. 25] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 26] IN CRIMINAL DISTRICT COURT NO. 2 OF HARRIS COUNTY, TEXAS

No. 43974

AGREEMENT AS TO STATEMENT OF FACTS

It is hereby agreed that the foregoing is a correct statement of all the facts given in evidence on the hearing of the

above entitled and numbered cause, in said court, at said term.

Witness our signatures on this the 24th day of August, A. D. 1937.

S. E. Bell and Shas. E. Kamp, for the State. Wilmer B. Hunt, Wm. H. Scott, Barksdale Stevens, Attorneys for Relator Herbert G. Tigner.

ORDER APPROVING STATEMENT OF FACTS

The foregoing Statement of Facts was submitted to me by the parties and upon examination of the same I find it to be true and correct, and approve it and order the same to be filed by the Clerk of this Court as a part of the record in said cause.

This, the — day of August, A. D. 1937.

Langston G. King, Judge of Criminal District Court No. 2 of Harris County, Texas.

[fols. 27-32] IN CRIMINAL DISTRICT COURT NO. 2 OF HARRIS COUNTY, TEXAS

No. 43974

EX PARTE HERBERT TIGNER

vs.

THE STATE OF TEXAS

JUDGMENT—July 29, 1937

This day came on to be heard before me, this application for the Writ of Habeas Corpus against Norfleet Hill, Sheriff of Harris County, Texas, and the said respondent, Norfleet Hill, having made due return of the said Writ of Habeas Corpus herein served upon him, and having produced before me the person of the said Herbert Tigner, I proceeded to hear the said application. And, after having examined the Writ and the return of the respondent, Norfleet Hill, and all papers and documents attached thereto, and having heard and considered pleadings and testimony offered on both sides, I am of the opinion that legal cause has been shown for the imprisonment of restraint of the said Herbert Tigner.

I am of the opinion that the said Herbert Tigner is legally held by valid indictment in custody and under restraint of his liberty by the said respondent, Norfleet Hill. It is therefore ordered and adjudged that the application of the said Herbert Tigner herein be denied, and that the said Herbert Tigner be and he is now hereby remanded to the custody of the said respondent, Norfleet Hill, Sheriff of Harris County, Texas.

To which action of the Court the relator excepts in open Court and gives notice of appeal to the Court of Criminal Appeals of Texas, at Austin, Texas; and bail pending appeal herein is fixed at $1000.00.

Book: Vol. 2, Page 198, Habeas Corpus Judgment Records.

[fol. 33] IN COURT OF CRIMINAL APPEALS OF TEXAS

From Harris County

No. 19,333

EX PARTE HERBERT TIGNER

OPINION—June 23, 1939

Appellant has been charged by indictment with entering into a conspiracy to fix the retail price of beer in violation of the provisions of Chapter 3, Title 19, Penal Code of the State of Texas, 1925. After his arrest and incarceration, he presented a petition to the Honorable Langston G. King, Judge of Criminal District Court No. 2 of Harris County, Texas, praying that a writ of habeas corpus issue to the end that he might be discharged from custody. The writ was issued, a hearing was had, and appellant was thereafter remanded to custody. The case is here on appeal.

It is the contention of appellant that the statute under which he is indicted is repugnant to the equal protection clause of the Fourteenth Amendment of the Constitution of the United States because of Article 1642, hereinafter quoted, which excludes from the operation of the statute agricultural products and live stock while in the hands of the producer or raiser. In considering this contention we deem it appropriate to set the statute out at length. It provides:

"Article 1632. A 'trust' is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for any or all of the following purposes:

"1. To create, or which may tend to create or carry out, restrictions in trade of commerce or aids to commerce, or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State.

"2. To fix, maintain, increase or reduce the price of merchandise, produce, or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

"3. To prevent or lessen competition in the manufacture, [fol. 34] making, transportation, sale or purchase of merchandise, produce, or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation.

"4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled or established.

"5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound, themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure, or by which they shall agree, in any manner, to keep the price of such article or commodity, or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation, at a fixed or graded figure, or by which they shall, in any manner, affect or maintain the price of any commodity or article, or the cost of transportation or insurance, or the cost of the preparation of any product for market or transportation, between them or themselves and others, to preclude a free and unrestricted com-

petition among themselves or others in the sale or transportation of any such article or commodity or business of transportation or insurance, or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity, or charge for transportation or insurance, or charge for the preparation of any product for market or transportation, whereby its price or such charge might be in any manner affected.

"6. To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation.

[fol. 35] "7. To abstain from engaging in or continuing business, or from the purchase or sale of merchandise, produce or commodities partially or entirely within this State, or any portion thereof."

"Art. 1633. A 'monopoly' is a combination or consolidation of two or more corporations when affected in either of the following methods:

"1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first article of this chapter.

"2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise."

"Art. 1634. Either or any of the following acts shall constitute a conspiracy in restraint of trade:

"1. Where any two or more persons, firms, corporations or associations of persons, who are engaged in buying or sell-

ing any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity.

"2. Where any two or more persons, firms, corporations or associations of persons, shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons."

"Art. 1635. Whoever violates any provision of this chapter shall be confined in the penitentiary for not less than two nor more than ten years."

"Art. 1636. Upon the application of the Attorney General or of any of his assistants, or of any district or county at- [fol. 36] torney, acting under the direction of the Attorney General, made to any county judge, or any justice of the peace, in this State, stating that he has reason to believe that a witness, who is to be found in the county in which such judge or justice is an officer, knows of a violation of any provision of this chapter, it shall be the duty of such judge, or justice, before whom such application is made, to have summoned and examined such witness in relation to violations of any provision of this chapter, said witness to be summoned as in criminal cases. The said witness shall be duly sworn; and the judge or justice shall cause the statements of the witness to be reduced to writing and signed and sworn to before him; such sworn statement shall be delivered to the attorney upon whose application the witness was summoned. Should the witness so summoned fail to appear or to make statements of the facts within his knowledge under oath, or to sign the same after it has been reduced to writing, he shall be guilty of contempt of court, and may be fined not exceeding one hundred dollars, and may be attached and imprisoned in jail until he makes a full statement of all the facts within his knowledge with reference to the matter inquired about. Any person who shall testify before any judge or justice as provided for in this chapter, or who shall testify as a witness for the State in the course of any statutory proceeding to secure testimony for the enforcement of this law, or in the course of any judicial proceeding to enforce the provisions of this chapter, shall not be subject to indictment or prosecution for any transaction,

matter or thing concerning which he shall so give evidence, documentary or otherwise."

"Art. 1637. If any person shall enter into an agreement or understanding of any character to form a trust, or to form a monopoly, or to form a conspiracy in restraint of trade, as these offenses are defined in this chapter, or shall form a trust, monopoly or conspiracy in restraint of trade, or shall be a party to the formation of a trust or monopoly or conspiracy in restraint of trade, or shall become a party to a trust or monopoly or conspiracy in restraint of trade, or shall do any act in furtherance of or aid to such trust or monopoly or conspiracy in restraint of trade, he shall be confined in the penitentiary not less than two nor more than [fol. 37] ten years."

"Art. 1638. If any person shall, as a member, agent, employee, officer, director or stockholder of any business, firm, corporation or association of persons, form, in violation of the provisions of this chapter, or shall operate, in violation of such provisions, any such business, firm, corporation or association formed in violation of this chapter, or shall make any sale, or purchase, or any other contract, or do business for such business, firm, corporation or association, or shall do any other act which has the effect of violating or aiding in the violation of any provision of this chapter, or shall, with the intent or purpose of driving out competition or for the purpose of financially injuring competitors, sell within this State at less than cost of manufacture or production, or sell in such a way or give away within this State, products for the purpose of driving out competition or financially injuring competitors engaged in a similar business, or give secret rebates on such purchase for the purpose of the aforesaid, he shall be confined in the penitentiary not less than two nor more than ten years."

"Art. 1639. If any person shall, outside of this State, do anything which, if done within this State, would constitute the formation of a trust or monopoly or conspiracy in the restraint of trade, as defined in this chapter, and shall cause or permit the trust or monopoly so formed by him to do business within this State, or shall cause or permit such trust, monopoly, or conspiracy in restraint of trade to have any operation or effect within this State, or, if such trust, monopoly or conspiracy in restraint of trade, having been formed

outside of said State, any person shall give effect to such trust, monopoly or conspiracy, in this State, or he shall do anything to help or aid in doing business in this State, of otherwise violate the anti-trust laws of this State, or if any person shall buy or sell or otherwise make contracts for or aid any business, firm, corporation or association of persons, formed or operated in violation of any provision of this chapter, or so formed or operated as would be in violation of the laws of this State, if it had been formed within this State, he shall be confined in the penitentiary not less than two nor more than ten years."

[fol. 38] "Art. 1640. If any person, employe, agent, stockholder, or officer of any person, firm, association of persons, or corporation, now doing business in this State, have formed a trust, or monopoly, as defined in this chapter, or have formed a conspiracy in restraint of trade, as defined in this chapter, or shall do or perform any act of any character to carry out such trust, monopoly or conspiracy in restraint of trade, such person, employe, agent, stockholder, or officer, shall be confined in the penitentiary not less than two nor more than ten years."

"Art. 1641. Prosecutions under this chapter may be conducted in Travis County, or in any county wherein a trust, monopoly or conspiracy in restraint of trade is being carried on."

"Art. 1642. No provision of this law shall apply to agricultural products or live stock while in the hands of the producer or raiser. It shall be lawful for any person engaged in any kind of work or labor, manual or mental, or both, to associate with other such persons to form trades unions and other organizations for the purpose of protecting themselves in their personal work, personal labor, and personal service, in their respective pursuits and employments."

"Art. 1643. It shall be lawful for any members of such trades union or other organization or association, or any other person, to induce or attempt to induce, by peaceable and lawful means, any person to accept any particular employment, or quit any particular employment in which such person may then be engaged, or to enter any pursuit, or refuse to enter any pursuit, or quit any pursuit, in which such person may then be engaged. No such member shall

have the right to trespass upon the premises of another without the consent of the owner thereof."

"Art. 1644. The foregoing article shall not be held to apply to any combination or combinations, association or associations of capital, or capital and persons, natural or artificial, formed for the purpose of limiting the production or consumption of labor's products, or for any other purpose in restraint of trade. Nothing herein contained shall be held to interfere with the terms and conditions of private [fol. 39] contracts with regard to the time of service, or other stipulations between employers and employes. Nothing herein shall be construed to repeal, affect or diminish the force and effect of any statute now existing on the subject of trusts, conspiracies against trade, pools and monopolies."

In the case of Connolly v. Union Sewer Pipe Company, 184 U. S. 539, 46 L. ed. 679, which was decided more than thirty seven years ago, the Supreme Court of the United States held that a trust statute of the State of Illinois was invalid because it excluded from its operation "agricultural products or live stock while in the hands of the producer or raiser." If the decision in that case is to be regarded as determinative, appellant should be ordered discharged without further discussion of the question presented in this appeal. For reason which will later appear, we have reached the conclusion that the question should receive fresh consideration.

Adverting to the history of the litigation of the question in the State courts prior to the decision in the Connolly Case, it is observed that the first anti-trust statute of this State was enacted in 1889. It embraced a provision exempting from its operation agricultural products or live stock while in the hands of the producer or raiser. The same exemption was made a part of the anti-trust act of 1895, which also carried an exemption in favor of laborers, organized for the purpose of maintaining a "standard of services." In 1894, the anti-trust act of 1889 came before the Court of Civil Appeals of the Fourth Supreme Judicial District of the State in the case of Anheuser-Busch Brewing Association v. Houck, 27 S. W. 692. In sustaining the exemption relating to agricultural products and live stock, the court said: "It is apparent that all persons, of every class, upon whom the act professes to operate, are treated without distinction. This feature of a general statute is held to be the

test whether it is or not obnoxious to that objection, and we believe the act to be valid." When the case was considered by the Supreme Court of Texas the classification was again sustained, the court saying: "For the reasons given by the Court of Civil Appeals, we also agree with them in holding that the act is not in violation of the Constitution." Houck v. Brewing Association, 88 Texas 184. In 1898 the anti-trust act of 1895 was considered by the [fol. 40] Court of Civil Appeals of the Third Supreme Judicial District of the State in the case of Waters-Pierce Oil Company v. State, 44 S. W. 936. In overruling the contention that the classification was repugnant to the equal protection clause of the Fourteenth Amendment, the court said:

"The domestic welfare of the people of this State is within the keeping of its legislatures, and they are supposed to best know their wants and necessities, and the policy that shall govern its internal affairs, and the remedies needful in the pursuit of this policy, and that are necessary in order to extinguish or prevent evil and harmful conditions, affecting the general interest and the public welfare. These are matters political, and relate to the economic affairs of government, and are peculiarly within the knowledge of the lawmaking department thereof. The remedies, therefore, lie within the legislative province, and are, to some exent, confided to their discretion and wisdom. • • •

"In the pursuit of this policy, conditions might exist which would justify the legislature in creating and providing remedies adequate to suppress the evil, when applied to one class of subjects, which might not, in their opinion, be necessary to be applied to other classes; for the danger to the public welfare from the pursuit of the evil by the one class may be of such magnitude, and lead to such disastrous consequences, that corrective measures are absolutely essential to the order of good government, and to the repose and stability of society, while, upon the other hand, the danger in these respects from the excluded classes may be inappreciable, and the acts denounced so difficult of consummation at their hands, in injurious effects upon the welfare of the people, that corrective measures are not necessary to be applied to them. Now, combinations and trusts in restraint of trade, and the existence of monopolies, which place it within the power of those combining to effect and elevate the prices of commodities in use by the peoples

of the world under their enjoyment and necessities, are harmful to the welfare of the public, whenever and wherever such conditions are permitted to exist. With a knowledge of this fact within the mind of the lawmakers, the legislature of this state, in the light of history, and with knowl- [fol. 41] edge of current events, may, with much reason, have concluded that the danger from trusts and combinations, which in their operation would injuriously affect the people, would be at the hands of the buyer and seller and dealer in commodities, and not at the hands of the producers, and that, by reason of the generally admitted necessity of the producers to readily and speedily dispose of their products, and the difficulties in their way to a successful combination, relating to the disposition of their products, little, if any, danger to the public could be apprehended from that source. The legislatures of the state are supposed to have acted in this matter intelligently, and with a knowledge of the conditions and dangers confronting the people from combinations and trusts; and it requires little enlightenment to discover that at the time these laws were passed, and now, the disturbing classes, which were and now are so injuriously affecting the public welfare, are the buyers, sellers, and dealers in the articles in use by the people of this State. The unbridled license of these classes, which in many instances was exercised, had, within this State, as well as other sections of the country, assumed such proportions that the danger to the welfare of the people was so apparent that the layman as well as the lawgiver could discern it."

The Supreme Court of the State denied the application of the oil company for a writ of error, thereby sustaining the validity of the statute. In the case of State v. Compress Company, 95 Texas 603, the Supreme Court of the State, in giving effect to the decision in the Connolly Case, held the anti-trust statute of 1895 to be in conflict with the Fourteenth Amendment. In the course of the opinion the court said: "The defendant insists that the law is unconstitutional, therefore void in whole, and will not support the action to forfeit the charter. Upon the same objection we held the anti-trust law of 1889 to be constitutional, and there is no such difference between the two laws as would affect the decision of this question. We believe that our decision is correct; that the law is not in contravention of the Constitution of the State nor of the United States. Houck v.

Brewing Assn., 88 Texas 189. In the case of Connolly v. The Union S. and P. Co., 22 Supreme Court Reporter, 431, the Supreme Court of the United States held that a statute [fol. 42] of the State of Illinois, in all essential particulars the same as the Act of 1895, was in conflict with the Fourteenth Amendment to the Constitution of the United States because it excepted 'agricultural products and live stock while in the hands of the producer or raiser.' We recognize the superior authority of the Supreme Court of the United States upon this question, and in obedience to its decision, we shall hold that in so far as the law of 1895 comes within the terms of the Connolly Case, it is invalid; * * *"

Approximately two years prior to the decision in the Connolly Case the Supreme Court of Tennessee, in State v. Schlitz Brewing Company, 59 S. W. 1033, upheld the anti-trust statute of that state against the contention that it offended against the equal protection clause of the Fourteenth Amendment in exempting from its provisions "agricultural products or livestock while in the possession of the producer or raiser." In the course of the opinion the court said: "Allowing that all persons, natural and artificial, are alike ambitious of financial gain, and equally willing to acquire it through the means reprehended so distinctly in this act, it is nevertheless true that farmers and stock raisers in this state, when acting within their limited sphere of immunity from those penalties, have at most but few opportunities and slight facilities for impairing competition and controlling prices, while those of many of the other pursuits have such opportunities and facilities almost without limit. This difference, alone, to say nothing of others that may have been in the minds of the legislators, is amply sufficient to justify the classification made, and place it beyond judicial review."

The principle that a state may classify with reference to an evil to be prevented is well established in the decisions of the Supreme Court of the United States. See Radice v. New York, 264 U. S. 290, 68 L. ed. 691. It was applied by the court in Carroll v. Greenwich Insurance Company, 199 U. S. 399, 50 L. ed. 246, (decided November 27, 1905) in reaching the conclusion that a statute of the State of Iowa making it unlawful for two or more fire insurance companies doing business in the state to enter into any conspiracy or agreement relating to the rates to be charged for insurance, the amount of the commission to be allowed agents for pro-

curing insurance, or the manner of transacting the fire insurance business, did not present a case in which there was [fol. 43] no justification for the selection of fire insurance companies for its prohibitions. It was later invoked in Patsone v. Commonwealth of Pennsylvania, 232 U. S. 138, 58 L. ed. 539, (decided January 19, 1914) in which the court sustained a statute of the State of Pennsylvania making it unlawful for any unnaturalized foreign-born resident to kill any wild bird or animal except in defense of person or property. The court said: "But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. * * * The State 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.' "

In Ozan Lumber Company v. Union County National Bank, 207 U. S. 252, 52 L. ed. 195, (decided December 2, 1907) the Court sustained a statute of the State of Arkansas which provided: "Any vendor of any patented machine, implement, substance, or instrument of any kind or character whatsoever, when the said vendor of the same effects the sale of the same to any citizen of this State on a credit, and takes any character of negotiable instrument in payment of the same, the said negotiable instrument shall be executed on a printed form, and show upon its face that it was executed in consideration of a patented machine, implement, substance, or instrument, as the case may be, and no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument, and all such notes not showing on their face for what they were given shall be absolutely void." Section 4 of the act embraced an exemption as follows: "This act shall not apply to merchants and dealers who sell

[fol. 44] patented things in the usual course of business." In concluding that the exemption did not offend against the equal protection clause, the court said: "Its passage showed that the legislature was of opinion that fraud and imposition were frequent in the sale of property of this nature, except in the cases mentioned in section 4, and that temptations to false representations in regard to the virtues and value of the article sold were also frequently yielded to. * * * It was doubtless thought that merchants and dealers, as mentioned in the statute, while dealing with the patented things in the manner stated, would not be so likely to make representations or to engage in a fraud to effect a sale, as those covered by the statute."

In Welch Co. v. New Hampshire, decided January 3, 1939, (Supreme Court L. ed. Advance Opinions, 1938-1939, Vol. 83—No. 8, page 363) the court had under consideration a statute of the State of New Hampshire, section 8 of which provided: "It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property for hire on the highways of this State when the driver has been continuously on duty for more than twelve hours, and after a driver has been continuously on duty for twelve hours it shall be unlawful for him or for the owner of the vehicle to permit him to operate any such motor vehicle on the highways of this State until he shall have had at least eight consecutive hours off duty." The act required common carriers between points within the State to register their trucks with the Public Service Commission. Contract carriers included those, other than common carriers, who hauled for hire by motor vehicle on any road of the State. Exempted from the provisions of the act, as shown in sections 3 and 4 thereof, were those transporting products of their own manufacture, or labor and motor vehicles not principally engaged in the transportation of property for hire or operating exclusively in a city or town or within ten miles of its limits or beyond the 10-mile limit or not more than two trips in thirty days. In sustaining the statute the court used language as follows: "Sections 3, 4 and 8 are not repugnant to the equal protection clause. The State court found that the purpose of section 8 is 'to protect users of the highways of this State from the danger likely to result to them [fol. 45] from the operation thereon of trucks under the control of drivers suffering from the effects of fatigue.' Appel-

lant's contention is that the discrimination between drivers of motor carriers for hire subject to section 8 and those exempted by sections 3 and 4, has no fair or substantial relation to highway safety. It suggests, and we may assume, that the roads of New Hampshire are extensively used for transportation by trucks not regulated by sec. 8; that drivers of them are just as susceptible to fatigue from long hours of continuous operation as are those operating the trucks used by appellant and other common carriers for hire, and that the dangers attributable to fatigued drivers are the same in one class of service as in another. Appellant has failed to show that, in operations to which section 8 applies, continuous driving for more than 12 hours is not so much more prevalent than in those exempted (sections 3, 4) as to constitute a reasonable basis for the differentiation. We are of opinion that, for reasons given above, those stated by the state supreme court in this case and by this Court in Dixie Ohio Exp. Co. v. State Revenue Commission decided this day (— U. S. — post, 367, 59 S. Ct.—) the classification in question does not conflict with the rule of equal protection."

In Dominion Hotel Company v. Arizona, 249 U. S. 263, 63 L. ed. 597, (decided March 24, 1919) it is shown that the plaintiff in error, defendant, was engaged in a hotel business and permitted a woman to work in the hotel for eight hours and that the "said eight hours of work was not then and there performed within a period of twelve hours." The statute upon which the information was predicated provided as follows: "Provided further, that the said eight-hour period of work shall be performed within a period of twelve hours, the period of twelve hours during which such labor must be performed not to be applicable to railroad restaurants or eating houses, located upon railroad rights of way, and operated by or under contract with any railroad company." The defendant set up that the exception in the statute made it void under the Fourteenth Amendment, as depriving him of the equal protection of the laws. In sustaining the statute the court said: "The equal protection of the law does not mean that all occupations that are called by the same name must be treated in the same way. The power of the state 'may be determined by degrees of evil, or exercised in cases where detriment is specially experienced.'"

[fol. 46] The instances of other cases are also instructive. We cite some of them without comment. See Silver v. Silver, 280 U. S. 117, 74 L. ed. 221; Miller v. Wilson 236 U. S. 373, 59 L. ed. 628; Crescent Cotton Oil Company v. Mississippi, 257 U. S. 129, 66 L. ed. 167; International Harvester Company of America v. State of Missouri, 234 U. S. 199, 58 L. ed. 1277.

We have referred to these cases and quoted from some of them at length for the reason that one of the points which was pressed by the Court in supporting its ruling in the Connolly Case was that the exemption from the operation of the statute of agricultural products and live stock while in the hands of the producer or raiser could not be of slight consequence as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices. We cite them with no view of expressing the opinion that they are especially opposite and contain the elements of the case at bar and a decision upon them. The considerations governing their holdings are not altogether the same as those deemed by us to be controlling in determining whether the statute under consideration is repugnant to the equal protection clause of the Fourteenth Amendment.

We deem it proper at this point to say that, in view of the decisions of the Courts of Civil Appeals and of the Supreme Court of this State, sustaining the validity of our anti-trust statutes—which decisions, as already observed, were rendered prior to the holding in Connolly's Case—it is our purpose to test the validity of the statute in the light of the decisions of the Supreme Court of the United States in which the equal protection clause of the Fourteenth Amendment has been construed and applied.

While the rules by which the reasonableness of a classification adopted by the Legislature in dealing with economic policy may not change, it can not be said that supervening economic conditions may not render a classification reasonable which, under the conditions prevailing at a remote time, would have been purely arbitrary. If a classification declared to be arbitrary and unreasonable more than thirty seven years ago should be taken to foreclose legislative adoption of the same classification in an effort to deal with economic problems affecting the prosperity and general welfare of the people of the State, then it may be [fol 47] said that the police power of the State is so cir-

cumscribed by the Fourteenth Amendment as that the legislature is powerless to adequately deal with the problems resulting from changing economic conditions. It is in view of the supervening economic conditions since 1902 that we have not regarded the decision in the Connolly Case as determinative of the question in the case at bar. In reaching the conclusion that it should be again considered, we are cognizant of our duty to give effect to the decisions of the Supreme Court of the United States involving the application of the Fourtenth Amendment. We have been hesitant in reaching the conclusion that a discussion of the question should be renewed. But with due deference to the superior authority of the Supreme Court, we have felt that the importance of the question involved in this appeal to the people of the State make it our imperative duty in deciding the case to give it fresh consideration. See West Coast Hotel Company v. Parrish, 300 U. S. 377, 81 L. ed. 703.

Returning to the case before us, it is manifest that the whole statute is one concerned with economic policy. It is a declaration of mala prohibita as to combinations to control the price of commodities by merchants, traders, manufacturers, not, however, as to combinations of farmers and stock raisers in dealing with their products in hand which they have produced or raised. As pointed out in the dissenting opinion of Mr. Justice McKenna in the Connolly Case, the class included in the statute is composed of merchants, traders, manufacturers, all engaged in commercial transactions, who generally are congregated in the cities and towns, while the excluded class is composed of farmers and stock raisers who are scattered over farms and ranches. It was largely due to the difference of these situations that Mr. Justice McKenna expressed the opinion that the classification adopted by the Illinois Legislature, in dealing with the economic policy of that State, was permissible under the equal protection clause of the Fourteenth Amendment. Be that as it may, it is observed that the Fourteenth Amendment was not designed to interfere with the power of the State to deal with economic problems to the end that the general prosperity and well-being of the people might be promoted.

In Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 597, it was held that the police power embraces regula- [fol. 48] tions designed to promote the public convenience or the general prosperity, as well as regulations designed

to promote the public health, the public morals, or the public safety. This principle was reiterated in Bacon v. Walker, 204 U. S. 309, 51 L. ed. 499. In Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, the court used this language: "But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its 'police power', to prescribe regulations to promote the health, peace, morals, education and good order of the people, *and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity.*" (Italics ours.)

In Chicago, B. & Q. Ry. v. McGuire, 219 U. S. 547, 55 L. ed. 328, in referring to the scope of the judicial inquiry in deciding the question of the power of the Legislature to prescribe regulations for the promotion of the general welfare, the Court said:

"The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with the liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

"The principle was thus stated in McLean v. Arkansas, supra, (211 U. S. 539), pp. 547, 548; 'The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court [fol. 49] may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmis-

takably and palpably in excess of legislative power (cases cited.) * * * If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail.' "

The question is whether the legislature, in dealing with the economic policy with which the statute is concerned, has adopted a classification which can be said to have no reasonable relation to the promotion of the general welfare. The equal protection clause of the Fourteenth Amendment does not preclude the states from resorting to classifications for the purpose of legislation. Colgate v. Harvey, 296 U. S. 403, 80 L. ed. 299. But the classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanted shall be treated alike. In selecting some classes and leaving out others the legislature, while it keeps within this principle of classification, is allowed wide discretion. Big Vein Coal Company v. Read, 299 U. S. 30, L. ed. 1053. Before a court can interfere with the exercise of the judgment of the legislature in making a reasonable classification it must be able to say "that there is no fair reason for the law that did not require its extension to others whom it leaves untouched." Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673; Wilson v. Maryland, 218 U. S. 173, 54 L. ed. 987. In Lindsley v. Natural Carbonic Gas Co., 220 U. S. 59, 55 L. ed. 369, the rules by which a contention that a classification offends against the equal protection clause must be tested are summarized as follows:

"1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the [fol. 50] adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or

because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Bachtel v. Wilson, 204 U. S. 36, 41, 51 L. ed. 357, 359, 27 Sup. Ct. Rep. 243; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 256, 52 L. ed. 195, 197; 28 Sup. Ct. Rep. 89; Munn v. Illinois, 94 U. S. 113, 132, 24 L. ed. 77, 86; Henderson Bridge Co. v. Henderson, 173 U. S. 592, 615, 43 L. ed. 823, 831, 19 Sup. Ct. Rep. 553."

These rules have, in varying language, been applied in numerous decisions of the Supreme Court of the United States in construing legislative enactments against the contention that they violated the equal protection clause. We advert to some of the cases. In American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, the Court had under consideration a statute of the State of Louisiana imposing a tax on the business of refining sugar and molasses, based on the gross annual receipts of persons and corporations engaged in that business. The statute provided that it should not apply to planters and farmers, grinding and refining their own sugar and molasses, or to planters who granulated sugar for other planters during the rolling season. It was held that the exemption was valid, and that the act did not deny to persons and corporations engaged in a general refining business the equal protection of the laws.

In Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U. S. 284, 79 L. ed. 1439, it is shown that a [fol. 51] statute of the State of Georgia prescribed a system of regulation of private carriers for hire. Every private carrier operating a motor vehicle in the business of transporting persons or property for hire had to obtain from the Public Service Commission a certificate of public convenience or necessity; had to give a bond for protection against damage caused by negligence; had to pay for the service a fee of thirty five dollars; and at the same time and annually thereafter had to pay a registration and license fee for every vehicle so operated. One of the exemptions in the act was that it did not apply to motor vehicles engaged exclusively in the transportation of agricultural or dairy

products between farms, markets, gins, warehouse or mill, where the weight of the motor vehicle did not exceed ten thousand pounds and whether such vehicle was owned by the owner or producer of such agricultural or dairy products or not, so long as the title remained in the producer. The question before the court was whether the appellant, who was a private carrier for hire engaged in the transportation of household and office furniture between points in Georgia and other states, was denied the equal protection of the laws because of the requirement of the act that persons in his class should pay an annual fee of thirty five dollars in order to obtain a license, whereas carriers for hire of agricultural or dairy products were exempted from the requirements. The classification was sustained. Among other things, the Court said: "We think a classification thus designed to ameliorate the lot of the producers of farm and dairy products is not an arbitrary preference within the meaning and the condemnation of the Fourteenth Amendment. The plight of the Georgia farmer has been pictured by the state court in words already quoted. To free him of fresh burdens might seem to a wise statecraft to be a means whereby to foster agriculture and promote the common good."

Bearing in mind that the statute is concerned with economic policy, the only question is whether we can say in our judicial knowledge that the legislature could not have had any reasonable ground for believing that there were public considerations for the distinction made by the statute. When we look to the decisions of the state courts and the Supreme Court of the United States in which co-operative marketing statutes have been reviewed we find that there has [fol. 52] been widespread legislative approval of the co-operative plan for protecting scattered producers and advancing the public interest.

The necessity for the enactment of legislation designed to stabilize the prices of agricultural products and thereby promote the public interest grew out of intolerable economic conditions of which judicial notice has been taken by the courts of various States of the Union. The plight of the American farmer has been pictured by the Court of Appeals of Kentucky in words as follows: "We take judicial knowledge of the history of the country and of current events, and from that source we know that conditions at the time of the enactment of the Bingham Act were such that the agricultural producer was at the mercy of speculators and others

who fixed the price of the selling producer and the purchasing price of the final consumer through combinations and other arrangements, whether valid or invalid, and that by reason thereof the former obtained a grossly inadequate price for his products. So much so was that the case that the intermediate handler between the producer and the final consumer injuriously operated upon both classes and fattened and flourished at their expense. It was and is also a well known fact that without the agricultural producer, society could not exist, and the oppression brought about in the manner indicated was driving him from his farm, thereby creating a condition fully justifying an exception in his case from any provision of the common law, and likewise justifying legislative action in the exercise of its police power." See Liberty Warehouse v. Burley Tob. G. Co-Op. Ass'n, 271 S. W. 695.

The enactment of the co-operative marketing act of this state (Chap. 8, Tit. 93, Articles 5737 to 5764, R. C. S. 1925) manifests an effort to aid the agricultural producers of the state to co-operate to the end that prices of their products might be stabilized, that waste might be eliminated, and that general prosperity might be promoted. In Lennox v. Texas Cotton Co-Operative Association, 55 S. W. (2nd) 543, the Supreme Court of this State, in referring to co-operative marketing statutes said: "The almost unanimous demand for the enactment of co-operative marketing association laws and the current events with respect to the urge for the passage of legislation to promote prosperity in agricultural [fol. 53] pursuits is well known to the courts. Nearly every state in the Union enacted co-operative marketing statutes substantially like the one under review. To the same purpose Congress enacted the Clayton Act, October 15, 1914, chap. 323, 38 Stat. at L. 730; the Capper-Volstead Act, February 18, 1922, chap. 57, 42 Stat. at L. 388, U. S. C., title 7, secs. 291, 292 (7 U. S. C. A. secs. 291, 292); and the Co-operative Marketing Act of July 2, 1926, chap. 725, 44 Stat. at L. 802 U. S. C. title 7, sec. 414-1 et seq. (Mason's), 7 U. S. C. A. secs. 451-457. These marketing acts have been given a liberal construction by the courts in order to accomplish the purpose for which they were enacted. See Liberty Warehouse Co. v. Burley T. G. Co-Op. Ass'n, 276 U. S. 71, 48 S. Ct. 291, 72 L. ed. 473, and the cases cited and referred to in the footnotes."

In Liberty Warehouse Co. v. Burley T. G. M. Asso., 276 U. S. 71, 72 L. ed. 473, the Supreme Court of the United States, after referring decisions of the various state courts in which the necessity for co-operative action by agricultural producers was recognized as being essential to the general prosperity of the nation, used this language:

"It is stated without contradiction that co-operative marketing statutes substantially like the one under review have been enacted by forty-two states. * * * These statutes reveal widespread legislative approval of the plan for protecting scattered producers and advancing the public interest. Although frequently challenged, we do not find that any court has condemned an essential feature of the plan with the single exception of the Supreme Court of Minnesota in the above cited case."

In the case last quoted from the Supreme Court of the United States sustained the validity of the co-operative marketing statute of Kentucky and held that the state had the right to treat marketing contracts between the association and its members as of a separate class. The court said:

"The opinion generally accepted—and upon reasonable grounds, we think—is that the co-operative marketing statutes promote the common interest. The provisions for protecting the fundamental contracts against interference by outsiders are essential to the plan. This court has recognized as permissible some discrimination intended to encourage agriculture. American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 105, 21 Sup. Ct. Rep. 43; [fol. 54] Cox v. Texas, 202 U. S. 446, 50 L. ed. 1099, 26 Sup. Ct. Rep. 671. And in many cases it has affirmed the general power of the states so as to legislate as to meet a definitely threatened evil. International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 52 L. R. A. (N. S.) 525, 34 Sup. Ct. Rep. 859; Jones v. Union Guano Co., 264 U. S. 171, 68 L. ed. 623, 44 Sup. Ct. Rep. 280. Viewing all the circumstances, it is impossible for us to say that the legislature of Kentucky could not treat marketing contracts between the association and its members as of a separate class, provide against probable interference therewith, and to that extent limit the sometime action of warehousemen."

Presumably the legislature was moved by economic considerations in exception agricultural products and live stock from the provisions of the statute. Indeed, the economic conditions to which reference has been made would seem to fully justify the conclusion that there was reasonable ground for believing that there were public considerations for making the exception. The legislature, in making the classification, was entitled to consider prevailing economic conditions and the differences between the classes in their relation to the ultimate object of the statute, which was the promotion of the general prosperity. We think that in view of the prevailing economic conditions at the time of the enactment of the statute it can not be said that the distinction made is unreasonable.

In concluding, we express the view that the dissenting opinion of Mr. Justice McKenna in the Connolly Case, when viewed in the light of present economic conditions, is a complete answer to the contention of the appellant that the statute is repugnant to the equal protection clause of the Fourteenth Amendment. Among other things, he said:

"What was the purpose of the Illinois statute, and what were the relations of its classes to that purpose? The statute was the expression of the purpose of the state to suppress combinations to control the prices of commodities, not, however, in the hands of the producers, but in the hands of traders, persons, or corporations. Shall we say that such suppression must be universal or not at all? How can we? What knowledge have we of the condition in Illinois which [fol. 55] invoked the legislation, or in what form and extent the evil of combinations to control prices appeared in that state? Indeed, whether such combinations are evils or blessings, or to what extent either, is not a judicial inquiry. If we can assume them to be evil because the statute does so, can we go beyond the statute and determine for ourselves the local conditions and condemn the legislation dependent thereon? But are there not, between the classes which the statute makes, distinctions which the legislature had a right to consider? Of whom are the classes composed? The excluded class is composed of farmers and stockraisers while holding the products or live stock produced or raised by them. The included class is composed of merchants, traders, manufacturers, all engaged in commercial transactions. That is, one class is composed of

persons who are scattered on farms; the other class is composed of persons congregated in cities and towns, not only of natural persons, but of corporate organizations. In the difference of these situations, and in other differences which will occur to any reflections, might not the legislature see difference in opportunities and powers between the classes in regard to the prohibited acts. That differences exist can not be denied. To ascribe and contrast them might be invidious. To consider their effect would take us from legal problems to economic ones, and this deminstrates to my mind how essentially any judgment or action based upon those differences is legislative and can not be reviewed by the judiciary."

The judgment is affirmed.

Christian, Judge.

(Delivered June 23, 1939.)

The foregoing opinion of the Commission of Appeals has been examined by the Judges of the Court of Criminal Appeals and approved by the Court.

[fol. 56] In Court of Criminal Appeals of Texas

Judgment—June 23, 1939

"This cause came on to be heard on the transcript of the record of the court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the relator pay all costs in this behalf expended, and that this decision be certified below for observance."

[fol. 57] In Court of Criminal Appeals of Texas

[Title omitted]

Opinion on Motion for Rehearing—November 15, 1939

The relator has filed a vigorous motion, evidencing dissatisfaction not only with the reasoning of the original

reasoning inevitably led this court. The burden of his complaint seems directed at the phrase contained in the original opinion wherein it is said:

"While the rules by which the reasonableness of a classification adopted by the Legislature in dealing with economic policy may not change, it can not be said that supervening economic conditions may not render a classification reasonable which, under the conditions prevailing at a remote time, would have been purely arbitrary."

Although the law may be said to be changeless, nevertheless that which primarily evoked its enactment may have long since either changed or have been forgotten. The primary reason for the enactment of such law may have passed, but changing conditions, customs or environments might have caused its retention to become advisable, and it would still fulfill a duty and function to society. If so the usefulness of the law would surely continue, and would attach itself to the changed economic condition. An apt illustration might be that our penal statute against the carrying of arms exempted from its operation a person traveling; and such an exemption had been construed to mean, among other things, a person who was absent from home a day's journey, at such time of possibly thirty miles, and his return therefrom on the succeeding day. Changing economic conditions, however, at this day and time have supervened, and thirty miles is now but an hour's journey, and one taking such a journey would hardly be termed a traveler under such an exemption. By such phrase we could only mean that a classification being permissible, such must be reasonable and not palpably arbitrary, and under the exhaustive original opinion herein we think the reasonableness of this classification has been shown. Principles never change; it is only the [fol. 58] application of such principles to the facts and conditions that authorize a change. That economic conditions govern largely in such an application of this anti-trust statute can not be denied. It concerns itself alone with such conditions. In the Connolly Case, decided March 10, 1902, the United States Supreme Court decided that an exemption of farmers and stock raisers from the provisions of the Illinois anti-trust law, while their products remained in their own hands, was an unreasonable and arbitrary classification, thus rendering such law obnoxious to the 14th Amendment to the U. S. Constitution. We therefore see that the vice

found in such exemption lay only in what that court considered its unreasonableness. It is our present thought that the conditions then present have changed; that supervening economic conditions have enlarged upon the different position of one who has produced commodities absolutely necessary for the continuance,—not convenience,—of human life and its well-being, as contradistinguished from one who merely takes these necessities after their production and juggles with them for the purpose of taking a profit therefrom. Under such supervening economic conditions we still adhere to the herein expressed conclusions in the original opinion, that a reviewing court will look favorably upon the reasonableness of the classification that exempts farmers and stock raisers from the provisions of our anti-trust laws so long as their products remain in their own hands.

The original opinion herein was written after many months of careful research through many cases on the subject written by the major courts of the Union, as well as the United States Supreme Court, and we adhere to the views expressed therein.

The motion is overruled.

Graves, Judge.

(Delivered November 15, 1939.)

[fol. 59] IN COURT OF CRIMINAL APPEALS OF TEXAS

ORDER OVERRULING RELATOR'S MOTION FOR REHEARING—November 15, 1939

"This cause came on to be heard on the appellant's motion for rehearing, and the same being considered, it is ordered, adjudged and decreed by the Court that said motion be and the same is hereby in all things overruled."

[fol. 60] IN COURT OF CRIMINAL APPEALS OF TEXAS

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable F. L. Hawkins, Presiding Judge of the Court of Criminal Appeals of Texas:

I

Petitioner, Herbert Tigner, is a citizen of the United States of America and of the State of Texas, residing in

Harris County in said State, and is the appellant in the above entitled and numbered cause recently decided by the Court of Criminal Appeals of Texas.

II

Petitioner, having been charged by a purported indictment with entering into a conspiracy to fix the retail price of beer in violation of the provisions of Chapter 3, Title 19, Penal Code of the State of Texas, 1925, presented a petition to the Honorable Langston King, Judge of the Criminal District Court No. 2 of Harris County, Texas, after his arrest and incarceration, praying that a writ of habeas corpus issue to the end that he might be discharged from custody on the ground that the indictment was void because the statute of the State of Texas on which it was predicated, violated the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States. The writ was issued, a hearing [fol. 61] was had and it was adjudged at said hearing that the statute drawn in question was not violative of the Fourteenth Amendment to the Constitution of the United States, that the indictment was valid and the appellant was remanded to the custody of the Sheriff of Harris County, Texas, to await trial on said indictment.

III

Petitioner appealed from said judgment to the Court of Criminal Appeals of Texas, in the form and manner provided by law, and the judgment of the Criminal District Court No. 2 of Harris County, Texas, was affirmed by the Court of Criminal Appeals of Texas on June 23, 1939, and thereafter your Petitioner applied for a rehearing which was denied by said Court on November 15, 1939.

IV

In said cause there was drawn in question in the Criminal District Court No. 2 of Harris County, Texas, and in the Court of Criminal Appeals of Texas, the validity of a statute of the State of Texas on the ground of its being repugnant to the Constitution of the United States and the decision in both courts was in favor of its validity. Appellant

contended in each of said courts that Chapter 3, Title 19 of the Penal Code of the State of Texas, 1925, defining trusts, monopolies and conspiracies in restraint of trade, violated Section 1 of the Fourteenth Amendment to the Constitution of the United States, because in exempting from its operation and from the penalties therein prescribed "agricultural products and livestock while in the hands of [fol. 62] the producer or raiser," it deprived Appellant of his liberty without due process of law, and denied to him the equal protection of the law.

V

That the Honorable Gerald C. Mann is Attorney General of Texas, and Honorable Lloyd Davidson is State's Attorney before the Court of Criminal Appeals of Texas; that they each have an official residence in Travis County, Texas, and are the persons charged by law with the duty of representing the State of Texas in this cause and are the proper persons upon whom service of process should be served in this case.

VI

Petitioner presents herewith his Assignments of Error upon which he claims to be entitled to an appeal from the judgment of the Criminal District Court No. 2 of Harris County and the Court of Criminal Appeals of Texas against him in said cause.

Wherefore, Petitioner prays for an allowance of an appeal from the final judgment of the Court of Criminal Appeals of Texas against Petitioner to the Supreme Court of the United States in order that the decision and judgment of the Court of Criminal Appeals of Texas may be examined and reversed; and further prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Court of Criminal Appeals of Texas, be sent to the Supreme Court of the United States as provided by law.

[fol. 63] Petitioner further prays that the appeal herein may be a supersedeas; that the court by appropriate order will fix the security required in accordance with the law and that on approval of such security, such appeal may be allowed as a supersedeas with respect to all of said jud

ments, and that this court reserve jurisdiction with respect to all of such judgments to reverse the same in accordance with the judgment and mandate of the Supreme Court of the United States in the appeal hereby prayed for.

Chas. I. Francis, Wm. A. Vinson, Attorneys for Appellant-Petitioner. Vinson, Elkins, Weems & Francis, of Counsel.

[fol. 64] IN COURT OF CRIMINAL APPEALS OF TEXAS

[Title omitted]

ASSIGNMENTS OF ERROR

Herbert Tigner, Appellant in the above entitled and numbered cause, respectfully submits that in the record, proceedings and final decree of the Criminal District Court No. 2 of Harris County, Texas (the trial court) in this case, and in the record, proceedings and final decree of the Court of Criminal Appeals of Texas (the highest court of the State of Texas which could or can decide this cause) in this case, there is manifest error injurious to the Appellant in this, to-wit:

I

In said suit there was drawn in question the validity of the statutes of the State of Texas, Chapter 3, Title 19, Penal Code of the State of Texas, 1925, defining trusts, monopolies and conspiracies in restraint of trade, and the Court of Criminal Appeals erred in holding that said statutes were constitutional and did not deprive Appellant of his liberty without due process of law or deny to Appellant the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States in exempting from their operation, and from the pains and penalties prescribed therein, "agricultural products and livestock while in the hands of producer or raiser."

[fol. 65]

II

The Court of Criminal Appeals of Texas erred in refusing to follow the decision of the Supreme Court of the United States in Connolly vs. Union Sewer Pipe Company, 184 U. S. 539, "in view of the supervening economic conditions

since 1902" (the year said Connolly case was decided), because in the Connolly case a statute of the State of Illinois, identical in all essential particulars with the statute of the State of Texas, was drawn in question and was held unconstitutional by the Supreme Court of the United States as repugnant to the Fourteenth Amendment to the Constitution of the United States on account of the exemption from its operation and the pains and penalties thereof of "agricultural products and livestock while in the hands of the producer or raiser."

III

The opinion of the Court of Criminal Appeals of Texas, in sustaining the validity of the Texas statute in question, is in direct conflict with the opinion of the Supreme Court of the United States in the case of Connolly vs. Union Sewer Pipe Company, 184 U. S. 539, in which a statute of the State of Illinois, identical in all essential particulars with the Texas Statute, was drawn in question and was held by said court to be unconstitutional as repug*m*ant to the Fourteenth Amendment to the Constitution of the United States by reason of the exemption of "agricultural products and livestock while in the hands of the producer or raiser," and the [fol. 66] Court of Criminal Appeals of Texas erred in refusing to follow the decision of the Supreme Court of the United States in said Connolly case.

IV

The Court of Criminal Appeals of Texas erred in refusing to follow the decision of the Supreme Court of the United States in the case of Connolly vs. Union Sewer Pipe Company, 184 U. S. 539 as the law of the case and in so doing also overruled its own prior decisions, including Johnson vs. State, 124 S. W. (2d) 1001, and Carter vs. State of Texas, 46 S. W. 236, 48 S. W. 508, in which the Court of Criminal Appeals declared:

"Whatever may be our views upon this question, so far as we are concerned, it being a federal question, *it is res adjudicata*, and the decisions of the Supreme Court of the United States are the law on the subject. Citing 39 Tex. Cr. R. 345, 48 S. W. 510."

The questions presented by the foregoing assignments of error (except No. IV which was raised on motion for rehear-

ing in the Court of Criminal Appeals of Texas, the first opportunity) were raised by Appellant in the trial court on petition for a writ of habeas corpus as appears from the record now on file in the Court of Criminal Appeals of Texas.

PRAYER FOR REVERSAL

For which errors Appellant, Herbert Tigner, prays that said judgment of the Court of Criminal Appeals of Texas and said judgment of the Criminal District Court No. 2 of [fols. 67-74] Harris County, Texas, in the above entitled and numbered cause be reversed and judgment ordered in favor of Appellant and for costs.

Chas. I. Francis, Wm. A. Vinson, Attorneys for Appellant, Herbert Tigner. Vinson, Elkins, Weems & Francis, of Counsel.

A copy of the within and foregoing Assignments of Error were received by us on this the 12th day of December, 1939.

Gerald C. Mann, Attorney General of Texas, by A. S. Rollins, Assistant; Lloyd Davidson, State's Attorney Before the Court of Criminal Appeals of Texas.

[fol. 75] IN COURT OF CRIMINAL APPEALS OF TEXAS

[Title omitted]

ORDER ALLOWING APPEAL

To the Supreme Court of the United States:

The petition for appeal to the Supreme Court of the United States in this case having been presented to me, F. L. Hawkins, Presiding Judge of the Court of Criminal Appeals of Texas, on this the 12th day of December, 1939, the same is hereby allowed, and it is directed that said appeal shall operate as a supersedeas and the supersedeas bond is fixed in the sum of One Thousand Dollars ($1,000.00). Upon the filing of said bond within ten (10) days from this date, the Clerk of the Court of Criminal Appeals of Texas shall stay in all things the mandate of this court pending a decision of this case on appeal by the Supreme Court of the United States. In allowing this appeal

it is certified that the alleged federal questions as set forth in the petition for appeal and in the assignments of error were raised in the trial court and timely preserved and raised in this Court and were by this Court overruled in the disposition made of the case.

This order is made and entered at Austin, Travis County, Texas, on this the 12th day of December, 1939.

F. L. Hawkins, Presiding Judge of the Court of Criminal Appeals of Texas.

[fols. 76-78] Bond on appeal for $1,000.00, approved December 12, 1939, omitted in printing.

[fols. 79-89] Citation, in usual form, showing service on Gerald C. Mann et al. omitted in printing.

[fol. 90] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 91] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed January 11, 1940

Herbert Tigner, Appellant in the above entitled and numbered cause, states that the points upon which he intends to rely in the Supreme Court of the United States on the appeal of this case and the parts of the record to be printed are those hereinafter stated, to-wit:

Points Upon Which Appellant Intends to Rely

Point 1

Chapter 3, Title 19, Penal Code of the State of Texas, 1925, defining trusts, monopolies and conspiracies in restraint of trade, is unconstitutional and void as repugnant to Section 1 of the Fourteenth Amendment to the Constitu-

tion of the United States, because by reason of the exemption from its operation and the pains and penalties therein prescribed of "agricultural products and livestock while in the hands of the producer or raiser," it deprives Appellant of his liberty without due process of law and denies to Appellant the equal protection of the laws.

[fol. 92] Point 2

The Court of Criminal Appeals of Texas erred in refusing to follow the deci ion of the Supreme Court of the United States in the case of Connolly vs. Union Sewer Pipe Company, 184 U. S. 539, in which it was adjudicated that a statute of the State of Illinois, identical in all essential particulars with the statute of the State of Texas, and which specifically exempted from its operation "agricultural products and livestock while in the hands of the producer or raiser," was unconstitutional as repugnant to the "due process" and "equal protection" clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Point 3

The Court of Criminal Appeals of Texas erred in refusing to follow the decision of the Supreme Court of the United States in the case of Connolly vs. Union Sewer Pipe Company, 184 U. S. 539, which decided the very question involved in this case, and which established the rule of decision and law in this case contrary to the decision of the Court of Criminal Appeals of Texas.

Point 4

The Court of Criminal Appeals of Texas erred in refusing to follow the decision of the Supreme Court of the United States in the case of Connolly vs. Union Sewer Pipe Company, 184 U. S. 539, "in view of the supervening economic conditions since 1902" (the year the Connolly case was decided), because supervening economic conditions can [fol. 93] not and do not justify a discrimination under the Fourteenth Amendment to the Constitution of the United States, as construed and applied by the Supreme Court in Connolly v. Union Sewer Pipe Company, against Appellant and in favor of farmers and cattle raisers, so that farmers and cattle raisers may do what dealers in other commodities can not do without being denounced and punished as felons.

Point 5

The Court of Criminal Appeals of Texas erred in refusing to follow the decision of the Supreme Court of the United States in the case of Connolly vs. Union Sewer Pipe Company, 184 U. S. 539, as the law of the case, and in also overruling its own prior decisions, including Johnson vs. State, 124 S. W. (2nd) 1001, in which the Court declared:

"By the recitals in said bill appellant appears to have brought himself squarely within the rule announced by Chief Justice Hughes of the Supreme Court of the United States in Norris vs. State of Alabama, 294 U. S. 578-599, 55 S. Ct. 579, 581; 79 L. Ed. 1074 * * * as said by Judge Davidson in Carter's case, supra (Carter vs. State of Texas, 46 S. W. 236, 48 S. W. 508): 'Whatever may be our views upon this question, so far as we are concerned, it being a federal question, it is res adjudicata, and the decisions of the Supreme Court of the United States are the law on the subject.' (39 Tex. Cr. R. 345, 48 S. W. 510.) The motion of the appellant raised a federal question and we are foreclosed by the agreed facts certified in the bill of exception."

[fol. 94]

Point 6

The Court of Criminal Appeals of Texas erred in refusing to hold that Chapter 3, Title 19, Penal Code of the State of Texas, 1925, was unconstitutional and void as repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, by reason of the exemption of "agricultural products and livestock while in the hands of the producer or raiser."

Designation of the Parts of the Record to be Printed

1. Caption.
2. Indictment.
3. Petition for writ of habeas corpus.
4. Statement of Facts in trial court.
5. Judgment of the trial court.
6. Judgment of the Court of Criminal Appeals of Texas on original submission.
7. Opinion of the Court of Criminal Appeals of Texas on the original submission.
8. Opinion of the Court of Criminal Appeals of Texas on motion for rehearing.
9. Judgment of the Court of Criminal Appeals on motion for rehearing.

10. Petition for Appeal to the Supreme Court of the United States.

11. The Assignments of Error.

12. Statement of grounds of jurisdiction of the Supreme Court.

13. The order allowing the appeal.

14. The appeal bond.

15. Citation of Appellee, the State of Texas.

16. Notice to Appellee, the State of Texas.

[fol. 95] 17. Points upon which Appellant intends to rely and designation of parts of the record to be printed.

18. Certificate of the Clerk of the Court of Criminal Appeals of Texas.

Chas. I. Francis, Wm. A. Vinson, Attorneys for Appellant Herbert Tigner. Vinson, Elkins, Weems & Francis, of Counsel.

Gerald C. Mann, Attorney General of Texas, and Lloyd Davidson, State's Attorney before the Court of Criminal Appeals of Texas, Attorneys of record and charged by law with the duty of representing Appellee in this case, hereby acknowledge due and timely service of the above statement of points to be relied upon and the designation of the parts of the record to be printed, and agree that said designation includes all parts of the record material and necessary to the consideration of the case and hereby waive the right to file counter-designation of parts of the record to be printed.

Dated at Austin, Texas this the 12th day of December, 1939.

Gerald C. Mann, Attorney General of Texas, by A. S. Rollins, Assistant. Lloyd W. Davidson, State's Attorney Before the Court of Criminal Appeals of Texas.

[fol. 96] [File endorsement omitted.]

Endorsed on cover: File No. 44,042. Texas, Court of Criminal Appeals. Term No. 635. Herbert Tigner, Appellant, vs. The State of Texas. Filed January 11, 1940. Term No. 635, O. T., 1939.

FILE COPY

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 635

HERBERT TIGNER,

Appellant,

vs.

THE STATE OF TEXAS

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

STATEMENT AS TO JURISDICTION

CHAS. L. FRANCIS,
WM. A. VINSON,
Counsel for Appellant.

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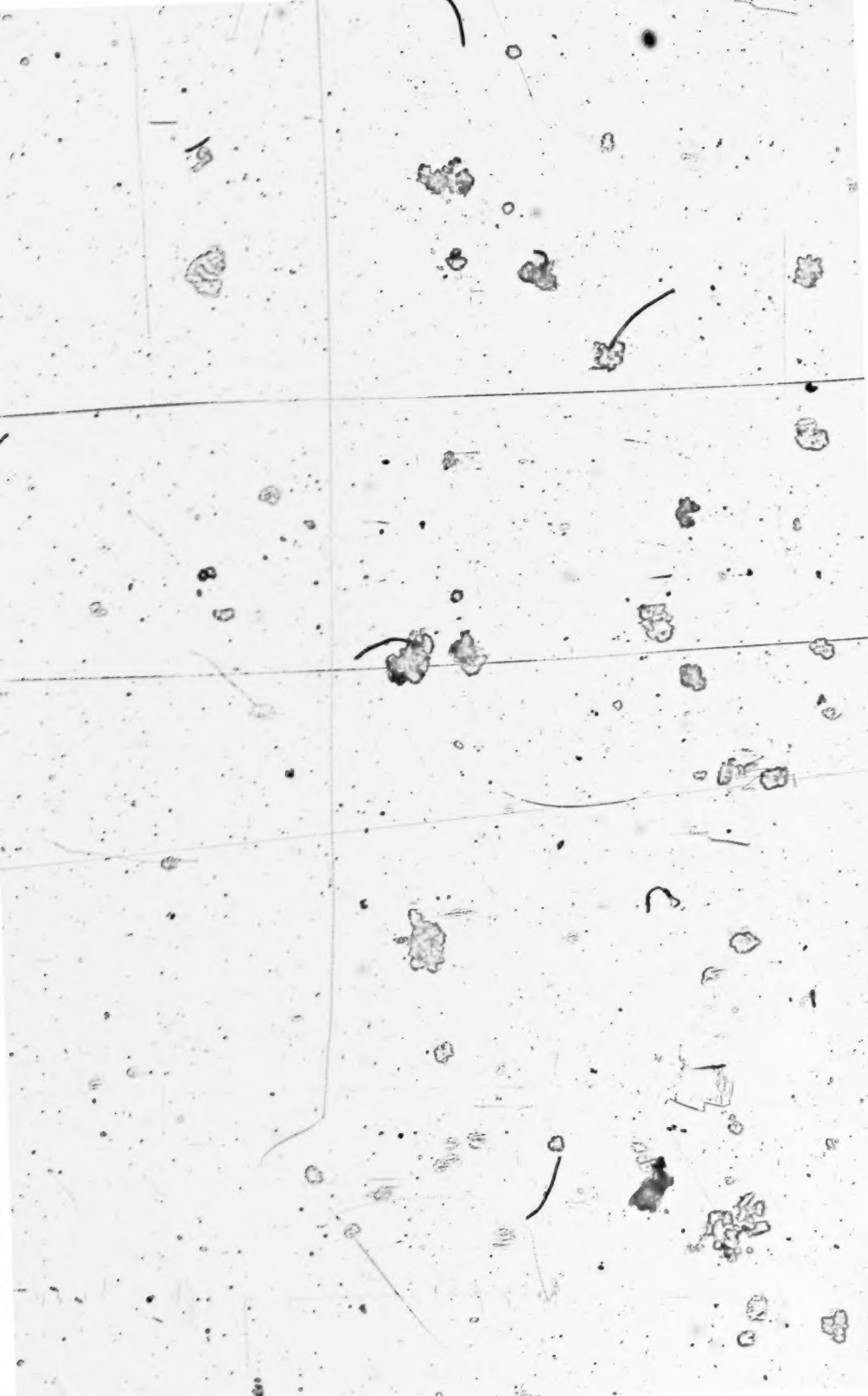

IN THE

COURT OF CRIMINAL APPEALS OF TEXAS

No. 19333

EX PARTE HERBERT TIGNER, *Appellant*

STATEMENT OF THE GROUNDS OF JURISDICTION

In support of the appellate jurisdiction of the Supreme Court of the United States in this cause, Appellant, Herbert Tigner, respectfully shows:

I

That this cause originated by the return of a purported indictment in the Criminal District Court No. 2 of Harris County, Texas, wherein the Appellant was charged with the offense of entering into a conspiracy to fix the retail price of beer in violation of the provisions of Chapter 3, Title 19, Penal Code of the State of Texas, 1925; that, after his arrest and incarceration, Appellant presented to the Honorable Langston G. King, Judge of the Criminal District Court No. 2 of Harris County, Texas, a petition praying that a writ of habeas corpus issue to the end that he might be discharged from custody, wherein Appellant contended that the indictment was void because the statute upon which it was predicated was violative of the Fourteenth Amendment to the Constitution of the United States, because it

exempted from its operation, and from the pains and penalties therein prescribed, "agricultural products and livestock while in the hands of the producer or raiser"; that a hearing was had on said petition and it was thereat adjudged that the statute and the indictment were valid and the Appellant was thereupon remanded to the custody of the Sheriff of Harris County, Texas, to await trial upon said indictment; that he timely prosecuted, in the manner and form provided by law, an appeal from the judgment of the Criminal District Court No. 2 of Harris County, Texas, to the Court of Criminal Appeals of Texas; that on June 23, 1939, the Court of Criminal Appeals of Texas, after having heard and considered said cause, entered its judgment in all things affirming the judgment of Criminal District Court No. 2 of Harris County, Texas; that thereafter Appellant, within the time and in the manner required by law, filed his motion for rehearing in the Court of Criminal Appeals of Texas, which was heard and considered by the Court of Criminal Appeals of Texas, and said motion for rehearing was in all things overruled on November 15, 1939, and the order of the Court of Criminal Appeals of Texas affirming the judgment of the Criminal District Court No. 2 of Harris County, Texas, was allowed to stand as the final judgment of the Court of Criminal Appeals in this cause; that the Court of Criminal Appeals of Texas is the court of last resort in all cases of a criminal nature prosecuted under the laws of the State of Texas, and it is the highest court of the State of Texas which could or can decide this cause; that it is constituted the court of last resort and the highest court of criminal jurisdiction under the constitution and laws of the State of Texas by the provisions of Article V, Sections 4 and 5 of the Constitution of Texas, and Articles 1801-1810, inclusive, of the Revised Civil Statutes of Texas; that the judgment of the Court of Criminal Appeals of Texas upon the overruling of Appellant's motion for

rehearing herein is final and conclusive except it be reversed by the Supreme Court of the United States. (Article 819, Code of Criminal Procedure of Texas.)

That the judgment affirming this cause was a final judgment within the meaning of Section 237 of the Judicial Code; that the time for taking the appeal began to run on November 15, 1939, and this petition for appeal is presented on this the 12th day of December, 1939.

II

This case is one in which the validity of a statute of the State of Texas, to-wit: Chapter 3, Title 19, Penal Code of the State of Texas, 1925, defining trusts, monopolies and conspiracies in restraint of trade, which statute was approved on the 7th day of February, 1925, is drawn in question upon the ground that said statute is repugnant to the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States. The statute is set out at length in the original opinion of the Court of Criminal Appeals but the pertinent portions thereof are as follows:

> "Article 1632. A 'trust' is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for any or all of the following purposes . . .
>
> 2. To fix, maintain, increase or reduce the price of merchandise, produce, or commodities, or the cost of insurance, or of the preparation of any product for market or transportation."
>
> "Article 1635. Whoever violates any provision of this chapter shall be confined in the penitentiary not less than two nor more than ten years."
>
> "Article 1637. If any person shall enter into an agreement or understanding of any character to form a trust, or to form a monopoly, or to form a conspiracy

in restraint of trade, as these offenses are defined in this chapter, or shall form a trust, monopoly or conspiracy in restraint of trade, or shall be a party to the formation of a trust or monopoly or conspiracy in restraint of trade, or shall become a party to a trust or monopoly or conspiracy in restraint of trade, or shall do any act in furtherance of or aid to such trust or monopoly or conspiracy in restraint of trade, he shall be confined in the penitentiary not less than two nor more than ten years."

"Article 1642. *No provision of this law shall apply to agricultural products or livestock while in the hands of the producer or raiser.*" • • •

It is the contention of Appellant that this statute, in exempting from its operation and the pains and penalties therein prescribed "agricultural products and livestock while in the hands of producer or raiser", is violative of the guarantees of the "due process" and "equal protection" clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States because a statute of the State of Illinois, identical in all essential respects with the above quoted statute of the State of Texas, was held unconstitutional by the Supreme Court of the United States in *Connolly v. Union Sewer Pipe Company*, 184 U. S. 539, by reason of the foregoing exemption.

III

The final decision of the Court of Criminal Appeals of Texas, the court of last resort in all criminal cases in the State of Texas, is in favor of the validity of said statute.

The foregoing questions under the Fourteenth Amendment to the Constitution of the United States were raised in the trial court on the petition for a writ of habeas corpus and were overruled as appears from the judgment of the trial court remanding the Appellant to the custody of the Sheriff, and they were raised in the Court of Criminal Ap-

peals of Texas by assignments of error appearing in the briefs of the parties and were overruled by the Court of Criminal Appeals as appears from the opinions of that court in this case. The parts of the record herein referred to are by the settled practice of this State matters of record before this Court and will be included in the transcript on appeal to the Supreme Court of the United States as a part thereof.

IV

In accordance with the rules of the Supreme Court of the United States (Rule 46, paragraph 2, 28 U. S. C. A., Section 354), Petitioner respectfully shows that this case is one in which under the legislation in force at the time the Act of January 31, 1928 (45 Stat. L. 54), was passed, to-wit: under Section 237 (a) of the Judicial Code (28 U. S. C. A., Section 344), a review could be had in the Supreme Court of the United States on a writ of error as a matter of right. The pertinent provisions of Section 237 (a) of the Judicial Code are as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * *"

The remedy of writ of error under the foregoing section has been abolished and an appeal substituted (45 Stat. 54; 45 Stat. 466; 28 U. S. C. A., Sections 861a and 861b).

V

The following cases are believed to sustain the appellate jurisdiction of the Supreme Court of the United States in this case:

New York ex rel. Bryant v. *Zimmerman*, 278 U. S. 63, 73 L. Ed. 184;

Holmes v. *Jennison*, 14 Pet. 540, 10 L. Ed. 579.

VI

The following case is believed to sustain the Petitioner's contention that the statute in question in this case denies to Petitioner the rights guaranteed under Section 1 of the Fourteenth Amendment to the Constitution of the United States:

Connolly v. *Union Sewer Pipe Company*, 184 U. S. 539.

It is, therefore, respectfully submitted that this case involves a substantial federal question under the Constitution of the United States and that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 of the Judicial Code.

Respectfully submitted,

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EXHIBIT "A"

No. 19,333. From Harris County.

Ex Parte Herbert Tigner.

Opinion.

Appellant has been charged by indictment with entering into a conspiracy to fix the retail price of beer in violation of the provisions of Chapter 3, Title 19, Penal Code of the State of Texas, 1925. After his arrest and incarceration, he presented a petition to the Honorable Langston G. King, Judge of Criminal District Court No. 2 of Harris County, Texas, praying that a writ of habeas corpus issue to the end that he might be discharged from custody. The writ was issued, a hearing was had, and appellant was thereafter remanded to custody. The case is here on appeal.

It is the contention of appellant that the statute under which he is indicted is repugnant to the equal protection clause of the Fourteenth Amendment of the Constitution of the United States because of Article 1642, hereinafter quoted, which excludes from the operation of the statute agricultural products and live stock while in the hands of the producer or raiser. In considering this contention we deem it appropriate to set the statute out at length. It provides:

"Article 1632. A 'trust' is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for any or all of the following purposes:

"1. To create, or which may tend to create or carry out, restrictions in trade of commerce or aids to commerce, or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State.

"2. To fix, maintain, increase or reduce the price of merchandise, produce, or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

"3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce, or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation.

"4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled or established.

"5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound, themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure, or by which they shall agree, in any manner, to keep the price of such article or commodity, or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation, at a fixed or graded figure, or by which they shall, in any manner, affect or maintain the price of any commodity or article or the cost of transportation or insurance, or the cost of the preparation of any product for market or transportation, between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity or business of transportation or insurance, or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity, or charge for transportation or insurance, or charge for the preparation of any product for market or transportation, whereby its price or such charge might be in any manner affected.

"6. To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation.

"7. To abstain from engaging in or continuing business, or from the purchase or sale of merchandise, produce or commodities partially or entirely within this State, or any portion thereof."

"Art. 1633. A 'monopoly' is a combination or consolidation of two or more corporations when affected in either of the following methods:

"1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first article of this chapter.

"2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise."

"Art. 1634. Either or any of the following acts shall constitute a conspiracy in restraint of trade:

"1. Where any two or more persons, firms, corporations or associations of persons, who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity.

"2. Where any two or more persons, firms, corporations or associations of persons, shall agree to boycott or threaten

to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons."

"Art. 1635. Whoever violates any provision of this chapter shall be confined in the penitentiary for not less than two nor more than ten years."

"Art. 1636. Upon the application of the Attorney General or of any of his assistants, or of any district or county attorney, acting under the direction of the Attorney General, made to any county judge, or any justice of the peace, in this State, stating that he has reason to believe that a witness, who is to be found in the county in which such judge or justice is an officer, knows of a violation of any provision of this chapter, it shall be the duty of such judge, or justice, before whom such application is made, to have summoned and examined such witness in relation to violations of any provision of this chapter, said witness to be summoned as in criminal cases. The said witness shall be duly sworn; and the judge or justice shall cause the statements of the witness to be reduced to writing and signed and sworn to before him; such sworn statement shall be delivered to the attorney upon whose application the witness was summoned. Should the witness so summoned fail to appear or to make statements of the facts within his knowledge under oath, or to sign the same after it has been reduced to writing, he shall be guilty of contempt of court, and may be fined not exceeding one hundred dollars, and may be attached and imprisoned in jail until he makes a full statement of all the facts within his knowledge with reference to the matter inquired about. Any person who shall testify before any judge or justice as provided for in this chapter, or who shall testify as a witness for the State in the course of any statutory proceeding to secure testimony for the enforcement of this law, or in the course of any judicial proceeding to enforce the provisions of this chapter, shall not be subject to indictment or prosecution for any transaction, matter or thing concerning which he shall so give evidence, documentary or otherwise."

"Art. 1637. If any person shall enter into an agreement or understanding of any character to form a trust, or to form a monopoly, or to form a conspiracy in restraint of trade, as these offenses are defined in this chapter, or shall form a trust, monopoly or conspiracy in restraint of trade, or shall be a party to the formation of a trust or monopoly or conspiracy in restraint of trade, or shall become a party to a trust or monopoly or conspiracy in restraint of trade, or shall do any act in furtherance of or aid to such trust or monopoly or conspiracy in restraint of trade, he shall be confined in the penitentiary not less than two nor more than ten years."

"Art. 1638. If any person shall, as a member, agent, employee, officer, director or stockholder of any business, firm, corporation or association of persons, form, in violation of the provisions of this chapter, or shall operate, in violation of such provisions, any such business, firm, corporation or association formed in violation of this chapter, or shall make any sale, or purchase, or any other contract, or do business for such business, firm, corporation or association, or shall do any other act which has the effect of violating or aiding in the violation of any provision of this chapter, or shall, with the intent or purpose of driving out competition or for the purpose of financially injuring competitors, sell within this State at less than cost of manufacture or production, or sell in such a way or give away within this State, products for the purpose of driving out competition or financially injuring competitors engaged in a similar business, or give secret rebates on such purchase for the purpose of the aforesaid, he shall be confined in the penitentiary not less than two nor more than ten years."

"Art. 1639. If any person shall, outside of this State, do anything which, if done within this State, would constitute the formation of a trust or monopoly or conspiracy in the restraint of trade, as defined in this chapter, and shall cause or permit the trust or monopoly so formed by him to do business within this State, or shall cause or permit such trust, monopoly, or conspiracy in restraint of trade to have any operation or effect within this State, or, if such trust,

monopoly or conspiracy in restraint of trade, having been formed outside of said State, any person shall give effect to such trust, monopoly or conspiracy, in this State, or he shall do anything to help or aid in doing business in this State, or otherwise violate the anti-trust laws of this State, or if any person shall buy or sell or otherwise make contracts for or aid any business, firm, corporation or association of persons, formed or operated in violation of any provision of this chapter, or so formed or operated as would be in violation of the laws of this State, if it had been formed within this State, he shall be confined in the penitentiary not less than two nor more than ten years."

"Art. 1640. If any person, employe, agent, stockholder, or officer of any person, firm, association of persons, or corporation, now doing business in this State, have formed a trust, or monopoly, as defined in this chapter, or have formed a conspiracy in restraint of trade, as defined in this chapter, or shall do or perform any act of any character to carry out such trust, monopoly or conspiracy in restraint of trade, such person, employe, agent, stockholder, or officer, shall be confined in the penitentiary not less than two nor more than ten years."

"Art. 1641. Prosecutions under this chapter may be conducted in Travis County, or in any county wherein a trust, monopoly or conspiracy in restraint of trade is being carried on."

"Art. 1642. No provision of this law shall apply to agricultural products or live stock while in the hands of the producer or raiser. It shall be lawful for any person engaged in any kind of work or labor, manual or mental, or both, to associate with other such persons to form trades unions and other organizations for the purpose of protecting themselves in their personal work, personal labor, and personal service, in their respective pursuits and employments."

"Art. 1643. It shall be lawful for any members of such trades union or other organization or association, or any other person, to induce or attempt to induce, by peaceable and lawful means, any person to accept any particular em-

ployment, or quit any particular employment in which such person may then be engaged, or to enter any pursuit, or refuse to enter any pursuit, or quit any pursuit, in which such person may then be engaged. No such member shall have the right to trespass upon the premises of another without the consent of the owner thereof."

"Art. 1644. The foregoing article shall not be held to apply to any combination or combinations, association or associations of capital, or capital and persons, natural or artificial, formed for the purpose of limiting the production or consumption of labor's products, or for any other purpose in restraint of trade. Nothing herein contained shall be held to interfere with the terms and conditions of private contracts with regard to the time of service, or other stipulations between employers and employes. Nothing herein shall be construed to repeal, affect or diminish the force and effect of any statute now existing on the subject of trusts, conspiracies against trade, pools and monopolies."

In the case of Connolly v. Union Sewer Pipe Company, 184 U. S. 539, 46 L. ed. 679, which was decided more than thirty seven years ago, the Supreme Court of the United States held that a trust statute of the State of Illinois was invalid because it excluded from its operation "agricultural products or live stock while in the hands of the producer or raiser." If the decision in that case is to be regarded as determinative, appellant should be ordered discharged without further discussion of the question presented in this appeal. For reason which will later appear, we have reached the conclusion that the question should receive fresh consideration.

Adverting to the history of the litigation of the question in the State courts prior to the decision in the Connolly Case, it is observed that the first anti-trust statute of this State was enacted in 1889. It embraced a provision exempting from its operation agricultural products or live stock while in the hands of the producer or raiser. The same exemption was made a part of the anti-trust act of 1895, which also carried an exemption in favor of laborers, organized for the purpose of maintaining a "standard of services." In 1894, the anti-trust act of 1889 came before

the Court of Civil Appeals of the Fourth Supreme Judicial District of the State in the case of Anheuser-Busch Brewing Association v. Houck, 27 S. W. 692. In sustaining the exemption relating to agricultural products and live stock, the court said: "It is apparent that all persons, of every class, upon whom the act professes to operate, are treated without distinction. This feature of a general statute is held to be the test whether it is or not obnoxious to that objection, and we believe the act to be valid." When the case was considered by the Supreme Court of Texas the classification was again sustained, the court saying: "For the reasons given by the Court of Civil Appeals, we also agree with them in holding that the act is not in violation of the Constitution." Houck v. Brewing Association, 88 Texas 184. In 1898 the anti-trust act of 1895 was considered by the Court of Civil Appeals of the Third Supreme Judicial District of the State in the case of Waters-Pierce Oil Company v. State, 44 S. W. 936. In overruling the contention that the classification was repugnant to the equal protection clause of the Fourteenth Amendment, the court said:

"The domestic welfare of the people of this State is within the keeping of its legislatures, and they are supposed to best know their wants and necessities, and the policy that shall govern its internal affairs, and the remedies needful in the pursuit of this policy, and that are necessary in order to extinguish or prevent evil and harmful conditions, affecting the general interest and the public welfare. These are matters political, and relate to the economic affairs of government, and are peculiarly within the knowledge of the lawmaking department thereof. The remedies, therefore, lie within the legislative province, and are, to some extent, confided to their discretion and wisdom. * * *

"In the pursuit of this policy, conditions might exist which would justify the legislature in creating and providing remedies adequate to suppress the evil, when applied to one class of subjects, which might not, in their opinion, be necessary to be applied to other classes; for the danger to the public welfare from the pursuit of the evil by the one class may be of such magnitude, and lead to such disastrous consequences, that corrective measures are absolutely essen-

tial to the order of good government, and to the repose and stability of society, while, upon the other hand, the danger in these respects from the excluded classes may be inappreciable, and the acts denounced so difficult of consummation at their hands, in injurious effects upon the welfare of the people, that corrective measures are not necessary to be applied to them. Now, combinations and trusts in restraint of trade, and the existence of monopolies, which place it within the power of those combining to effect and elevate the prices of commodities in use by the peoples of the world under their enjoyment and necessities, are harmful to the welfare of the public, whenever and wherever such conditions are permitted to exist. With a knowledge of this fact within the mind of the lawmakers, the legislature of this state, in the light of history, and with knowledge of current events, may, with much reason, have concluded that the danger from trusts and combinations, which in their operation would injuriously affect the people, would be at the hands of the buyer and seller and dealer in commodities, and not at the hands of the producers, and that, by reason of the generally admitted necessity of the producers to readily and speedily dispose of their products, and the difficulties in their way to a successful combination, relating to the disposition of their products, little, if any, danger to the public could be apprehended from that source. The legislatures of the state are supposed to have acted in this matter intelligently, and with a knowledge of the conditions and dangers confronting the people from combinations and trusts; and it requires little enlightenment to discover that at the time these laws were passed, and now, the disturbing classes, which were and now are so injuriously affecting the public welfare, are the buyers, sellers, and dealers in the articles in use by the people of this State. The unbridled license of these classes, which in many instances was exercised, had, within this State, as well as other sections of the country, assumed such proportions that the danger to the welfare of the people was so apparent that the layman as well as the lawgiver could discern it."

The Supreme Court of the State denied the application of the oil company for a writ of error, thereby sustaining the validity of the statute. In the case of State v. Compress

Company, 95 Texas 603, the Supreme Court of the State, in giving effect to the decision in the Connolly Case, held the anti-trust statute of 1895 to be in conflict with the Fourteenth Amendment. In the course of the opinion the court said: "The defendant insists that the law is unconstitutional, therefore void in whole, and will not support the action to forfeit the charter. Upon the same objection we held the anti-trust law of 1889 to be constitutional, and there is no such difference between the two laws as would affect the decision of this question. We believe that our decision is correct; that the law is not in contravention of the Constitution of the State nor of the United States. Houck v. Brewing Assn., 88 Texas 189. In the case of Connolly v. The Union S. and P. Co., 22 Supreme Court Reporter, 431, the Supreme Court of the United States held that a statute of the State of Illinois, in all essential particulars the same as the Act of 1895, was in conflict with the Fourteenth Amendment to the Constitution of the United States because it excepted 'agricultural products and live stock while in the hands of the producer or raiser.' We recognize the superior authority of the Supreme Court of the United States upon this question, and in obedience to its decision, we shall hold that in so far as the law of 1895 comes within the terms of the Connolly Case, it is invalid; * * *"

Approximately two years prior to the decision in the Connolly Case the Supreme Court of Tennessee, in State v. Schlitz Brewing Company, 59 S. W. 1033, upheld the anti-trust statute of that state against the contention that it offended against the equal protection clause of the Fourteenth Amendment in exempting from its provisions "agricultural products or livestock while in the possession of the producer or raiser." In the course of the opinion the court said: "Allowing that all persons, natural and artificial, are alike ambitious of financial gain, and equally willing to acquire it through the means reprehended so distinctly in this act, it is nevertheless true that farmers and stock raisers in this state, when acting within their limited sphere of immunity from those penalties, have at most but few opportunities and slight facilities for impairing competition and

controlling prices, while those of many of the other pursuits have such opportunities and facilities almost without limit. This difference, alone, to say nothing of others that may have been in the minds of the legislators, is amply sufficient to justify the classification made, and place it beyond judicial review."

The principle that a state may classify with reference to an evil to be prevented is well established in the decisions of the Supreme Court of the United States. See Radice v. New York, 264 U. S. 290, 68 L. ed. 691. It was applied by the court in Carroll v. Greenwich Insurance Company, 199 U. S. 399, 50 L. ed. 246, (decided November 27, 1905) in reaching the conclusion that a statute of the State of Iowa making it unlawful for two or more fire insurance companies doing business in the state to enter into any conspiracy or agreement relating to the rates to be charged for insurance, the amount of the commission to be allowed agents for procuring insurance, or the manner of transacting the fire insurance business, did not present a case in which there was no justification for the selection of fire insurance companies for its prohibitions. It was later invoked in Patsone v. Commonwealth of Pennsylvania, 232 U. S. 138, 58 L. ed. 539, (decided January 19, 1914) in which the court sustained a statute of the State of Pennsylvania making it unlawful for any unnaturalized foreign-born resident to kill any wild bird or animal except in defense of person or property. The court said: "But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. • • • The

State 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.' "

In Ozan Lumber Company v. Union County National Bank, 207 U. S. 252, 52 L. ed. 195, (decided December 2, 1907) the Court sustained a statute of the State of Arkansas which provided: "Any vendor of any patented machine, implement, substance, or instrument of any kind or character whatsoever, when the said vendor of the same effects the sale of the same to any citizen of this State on a credit, and takes any character of negotiable instrument in payment of the same, the said negotiable instrument shall be executed on a printed form, and show upon its face that it was executed in consideration of a patented machine, implement, substance, or instrument, as the case may be, and no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument, and all such notes not showing on their face for what they were given shall be absolutely void." Section 4 of the act embraced an exemption as follows: "This act shall not apply to merchants and dealers who sell patented things in the usual course of business." In concluding that the exemption did not offend against the equal protection clause, the court said: "Its passage showed that the legislature was of opinion that fraud and imposition were frequent in the sale of property of this nature, except in the cases mentioned in section 4, and that temptations to false representations in regard to the virtues and value of the article sold were also frequently yielded to. * * * It was doubtless thought that merchants and dealers, as mentioned in the statute, while dealing with the patented things in the manner stated, would not be so likely to make representations or to engage in a fraud to effect a sale, as those covered by the statute."

In Welch Co. v. New Hampshire, decided January 3, 1939, (Supreme Court L. ed. Advance Opinions, 1938-1939, Vol. 83—No. 8, page 363) the court had under consideration a statute of the State of New Hampshire, section 8 of which

provided: "It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property for hire on the highways of this State when the driver has been continuously on duty for more than twelve hours, and after a driver has been continuously on duty for twelve hours it shall be unlawful for him or for the owner of the vehicle to permit him to operate any such motor vehicle on the highways of this State until he shall have had at least eight consecutive hours off duty." The act required common carriers between points within the State to register their trucks with the Public Service Commission. Contract carriers included those, other than common carriers, who hauled for hire by motor vehicle on any road of the State. Exempted from the provisions of the act, as shown in sections 3 and 4 thereof, were those transporting products of their own manufacture, or labor and motor vehicles not principally engaged in the transportation of property for hire or operating exclusively in a city or town or within ten miles of its limits or beyond the 10-mile limit or not more than two trips in thirty days. In sustaining the statute the court used language as follows: "Sections 3, 4 and 8 are not repugnant to the equal protection clause. The State court found that the purpose of section 8 is 'to protect users of the highways of this State from the danger likely to result to them from the operation thereon of trucks under the control of drivers suffering from the effects of fatigue.' Appellant's contention is that the discrimination between drivers of motor carriers for hire subject to section 8 and those exempted by sections 3 and 4, has no fair or substantial relation to highway safety. It suggests, and we may assume, that the roads of New Hampshire are extensively used for transportation by trucks not regulated by sec. 8; that drivers of them are just as susceptible to fatigue from long hours of continuous operation as are those operating the trucks used by appellant and other common carriers for hire, and that the dangers attributable to fatigued drivers are the same in one class of service as in another. Appellant has failed to show that, in operations to which section 8 applies, continuous driving for

more than 12 hours is not so much more prevalent than in those exempted (sections 3, 4) as to constitute a reasonable basis for the differentiation. We are of opinion that, for reasons given above, those stated by the state supreme court in this case and by this Court in Dixie Ohio Exp. Co. v. State Revenue Commission decided this day (—— U. S. ——, post, 367, 59 S. Ct. ——) the classification in question does not conflict with the rule of equal protection."

In Dominion Hotel Company v. Arizona, 249 U. S. 263, 63 L. ed. 597 (Decided March 24, 1919) it is shown that the plaintiff in error, defendant, was engaged in a hotel business and permitted a woman to work in the hotel for eight hours and that the "said eight hours of work was not then and there performed within a period of twelve hours." The statute upon which the information was predicated provided as follows: "Provided further, that the said eight hour period of work shall be performed within a period of twelve hours, the period of twelve hours during which such labor must be performed not to be applicable to railroad restaurants or eating houses, located upon railroad rights of way and operated by or under contract with any railroad company." The defendant set up that the exception in the statute made it void under the Fourteenth Amendment, as depriving him of the equal protection of the laws. In sustaining the statute the court said: "The equal protection of the law does not mean that all occupations that are called by the same name must be treated in the same way. The power of the state 'may be determined by degrees of evil, or exercised in cases where detriment is specially experienced.'"

The instances of other cases are also instructive. We cite some of them without comment. See Silver v. Silver, 280 U. S. 117, 74 L. ed. 221; Miller v. Wilson, 236 U. S. 373, 59 L. ed. 628; Crescent Cotton Oil Company v. Mississippi, 257 U. S. 129, 66 L. ed. 167; International Harvester Company of America v. State of Missouri, 234 U. S. 199, 58 L. ed. 1277.

We have referred to these cases and quoted from some of them at length for the reason that one of the points which was pressed by the Court in supporting its ruling in the Connolly Case was that the exemption from the operation

of the statute of agricultural products and live stock while in the hands of the producer or raiser could not be of slight consequence as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices. We cite them with no view of expressing the opinion that they are especially opposite and contain the elements of the case at bar and a decision upon them. The considerations governing their holdings are not altogether the same as those deemed by us to be controlling in determining whether the statute under consideration is repugnant to the equal protection clause of the Fourteenth Amendment.

We deem it proper at this point to say that, in view of the decisions of the Courts of Civil Appeals and of the Supreme Court of this State, sustaining the validity of our anti-trust statutes—which decisions, as already observed, were rendered prior to the holding in Connolly's Case—it is our purpose to test the validity of the statute in the light of the decisions of the Supreme Court of the United States in which the equal protection clause of the Fourteenth Amendment has been construed and applied.

While the rules by which the reasonableness of a classification adopted by the Legislature in dealing with economic policy may not change, it can not be said that supervening economic conditions may not render a classification reasonable which, under the conditions prevailing at a remote time, would have been purely arbitrary. If a classification declared to be arbitrary and unreasonable more than thirty seven years ago should be taken to foreclose legislative adoption of the same classification in an effort to deal with economic problems affecting the prosperity and general welfare of the people of the State, then it may be said that the police power of the State is so circumscribed by the Fourteenth Amendment as that the legislature is powerless to adequately deal with the problems resulting from changing economic conditions. It is in view of the supervening economic conditions since 1902 that we have not regarded the decision in the Connolly Case as determinative of the question in the case at bar. In reaching the conclusion that it should be again considered, we are cognizant of our duty to give effect to the decisions of the Supreme Court of the

United States involving the application of the Fourteenth Amendment. We have been hesitant in reaching the conclusion that a discussion of the question should be renewed. But with due deference to the superior authority of the Supreme Court, we have felt that the importance of the question involved in this appeal to the people of the State makes it our imperative duty in deciding the case to give it fresh consideration. See West Coast Hotel Company *v.* Parrish, 300 U. S. 377, 81 L. ed. 703.

Returning to the case before us, it is manifest that the whole statute is one concerned with economic policy. It is a declaration of mala prohibita as to combinations to control the price of commodities by merchants, traders, manufacturers, not, however, as to combinations of farmers and stock raisers in dealing with their products in hand which they have produced or raised. As pointed out in the dissenting opinion of Mr. Justice McKenna in the Connolly Case, the class included in the statute is composed of merchants, traders, manufacturers, all engaged in commercial transactions, who generally are congregated in the cities and towns, while the excluded class is composed of farmers and stock raisers who are scattered over farms and ranches. It was largely due to the difference of these situations that Mr. Justice McKenna expressed the opinion that the classification adopted by the Illinois Legislature, in dealing with the economic policy of that State, was permissible under the equal protection clause of the Fourteenth Amendment. Be that as it may, it is observed that the Fourteenth Amendment was not designed to interfere with the power of the State to deal with economic problems to the end that the general prosperity and well-being of the people might be promoted.

In Chicago, B. & Q. R. Co. *v.* Illinois, 200 U. S. 561, 50 L. ed. 597, it was held that the police power embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. This principle was reiterated in Bacon *v.* Walker, 204 U. S. 309, 51 L. ed. 499. In Barbier *v.* Connolly, 113 U. S. 27, 28 L. ed. 923, the court used this language: "But neither the Amendment, broad and comprehensive as it is,

nor any other amendment was designed to interfere with the power of the State, sometimes termed its 'police power', to prescribe regulations to promote the health, peace, morals, education and good order of the people, *and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity.*" (Italics ours.)

In Chicago, B. & Q. Ry. *v.* McGuire, 219 U. S. 547, 55 L. ed. 328, in referring to the scope of the judicial inquiry in deciding the question of the power of the Legislature to prescribe regulations for the promotion of the general welfare, the Court said:

"The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with the liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

"The principle was thus stated in McLean *v.* Arkansas, supra, (211 U. S. 539), pp. 547, 548; 'The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power (cases cited.) * * * If there existed a condition of affairs con-

cerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail.' "

The question is whether the legislature, in dealing with the economic policy with which the statute is concerned, has adopted a classification which can be said to have no reasonable relation to the promotion of the general welfare. The equal protection clause of the Fourteenth Amendment does not preclude the states from resorting to classifications for the purpose of legislation. Colgate v. Harvey, 296 U. S. 403, 80 L. ed. 299. But the classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, to that all persons similarly circumstanced shall be treated alike. In selecting some classes and leaving out others the legislature, while it keeps within this principle of classification, is allowed wide discretion. Big Vein Coal Company v. Read, 299 U. S. 30. Before a court can interfere with the exercise of the judgment of the legislature in making a reasonable classification it must be able to say "that there is no fair reason for the law that did not require its extension to others whom it leaves untouched." Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673; Wilson v. Maryland, 218 U. S. 173, 54 L. ed. 987. In Lindsley v. Natural Carbonic Gas Co., 220 U. S. 59, 55 L. ed. 369, the rules by which a contention that a classification offends against the equal protection clause must be tested are summarized as follows:

"1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reason-

able basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Bachtel v. Wilson, 204 U. S. 36, 41, 51 L. ed. 357, 359, 27 Sup. Ct. Rep. 243; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 256, 52 L. ed. 195, 197, 28 Sup. Ct. Rep. 89; Munn v. Illinois, 94 U. S. 113, 132, 24 L. ed. 77, 86; Henderson Bridge Co. v. Henderson, 173 U. S. 592, 615, 43 L. ed. 823, 831, 19 Sup. Ct. Rep. 553."

These rules have, in varying language, been applied in numerous decisions of the Supreme Court of the United States in construing legislative enactments against the contention that they violated the equal protection clause. We advert to some of the cases. In American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, the Court had under consideration a statute of the State of Louisiana imposing a tax on the business of refining sugar and molasses, based on the gross annual receipts of persons and corporation engaged in that business. The statute provided that it should not apply to planters and farmers, grinding and refining their own sugar and molasses, or to planters who granulated sugar for other planters during the rolling season. It was held that the exemption was valid, and that the act did not deny to persons and corporations engaged in a general refining business the equal protection of the laws.

In Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U. S. 284, 79 L. ed. 1439, it is shown that a statute of the State of Georgia prescribed a system of regulation of private carriers for hire. Every private carrier operating a motor vehicle in the business of transporting persons or property for hire had to obtain from the Public Service Commission a certificate of public convenience or necessity; had to give a bond for protection against damage

caused by negligence; had to pay for the service a fee of thirty five dollars; and at the same time and annually thereafter had to pay a registration and license fee for every vehicle so operated. One of the exemptions in the act was that it did not apply to motor vehicles engaged exclusively in the transportation of agricultural or dairy products between farms, markets, gins, warehouse or mill, where the weight of the motor vehicle did not exceed ten thousand pounds and whether such vehicle was owned by the owner or producer of such agricultural or dairy products or not, so long as the title remained in the producer. The question before the court was whether the appellant, who was a private carrier for hire engaged in the transportation of household and office furniture between points in Georgia and other states, was denied the equal protection of the laws because of the requirement of the act that persons in his class should pay an annual fee of thirty five dollars in order to obtain a license, whereas carriers for hire of agricultural or dairy products were exempted from the requirements. The classification was sustained. Among other things, the Court said: "We think a classification thus designed to ameliorate the lot of the producers of farm and dairy products is not an arbitrary preference within the meaning and the condemnation of the Fourteenth Amendment. The plight of the Georgia farmer has been pictured by the state court in words already quoted. To free him of fresh burdens might seem to a wise statecraft to be a means whereby to foster agriculture and promote the common good."

Bearing in mind that the statute is concerned with economic policy, the only question is whether we can say in our judicial knowledge that the legislature could not have had any reasonable ground for believing that there were public considerations for the distinction made by the statute. When we look to the decisions of the state courts and the Supreme Court of the United States in which co-operative marketing statutes have been reviewed we find that there has been widespread legislative approval of the co-operative plan for protecting scattered producers and advancing the public interest.

The necessity for the enactment of legislation designed to stabilize the prices of agricultural products and thereby promote the public interest grew out of intolerable economic conditions of which judicial notice has been taken by the courts of various States of the Union. The plight of the American farmer has been pictured by the Court of Appeals of Kentucky in words as follows: "We take judicial knowledge of the history of the country and of current events, and from that source we know that conditions at the time of the enactment of the Bingham Act were such that the agricultural producer was at the mercy of speculators and others who fixed the price of the selling producer and the purchasing price of the final consumer through combinations and other arrangements, whether valid or invalid, and that by reason thereof the former obtained a grossly inadequate price for his products. So much so was that the case that the intermediate handler between the producer and the final consumer injuriously operated upon both classes and fattened and flourished at their expense. It was and is also a well known fact that without the agricultural producer, society could not exist, and the oppression brought about in the manner indicated was driving him from his farm, thereby creating a condition fully justifying an exception in his case from any provision of the common law, and likewise justifying legislative action in the exercise of its police power." See Liberty Warehouse v. Burley Tob. G. Co-Op. Ass'n., 271 S. W. 695.

The enactment of the co-operative marketing act of this state (Chap. 8, Tit. 93, Articles 5737 to 5764, R. C. S. 1925) manifests an effort to aid the agricultural producers of the state to co-operate to the end that prices of their products might be stabilized, that waste might be eliminated, and that general prosperity might be promoted. In Lennox v. Texas Cotton Co-Operative Association, 55 S. W. (2nd) 543, the Supreme Court of this State, in referring to co-operative marketing statutes said: "The almost unanimous demand for the enactment of co-operative marketing association laws and the current events with respect to the urge for the passage of legislation to promote prosperity in agricultural pursuits is well known to the courts. Nearly every state in the Union enacted co-operative marketing statutes substan-

tially like the one under review. To the same purpose Congress enacted the Clayton Act, October 15, 1914, chap. 323, 38 Stat. at L. 730; the Capper-Volstead Act, February 18, 1922, chap. 57, 42 Stat. at L. 388, U. S. C., title 7, secs. 291, 292 (7 USCA secs. 291, 292); and the Cooperative Marketing Act of July 2, 1926, chap. 725, 44 Stat. at L. 802 U. S. C. title 7, sec. 414-1 et seq. (Mason's), 7 USCA secs. 451-457. These marketing acts have been given a liberal construction by the courts in order to accomplish the purpose for which they were enacted. See Liberty Warehouse Co. v. Burley T. G. Co-Op. Ass'n., 276 U. S. 71, 48 S. Ct. 291, 72 L. ed. 473, and the cases cited and referred to in the footnotes."

In Liberty Warehouse Co. v. Burley T. G. M. Asso., 276 U. S. 71, 72 L. ed. 473, the Supreme Court of the United States, after referring decisions of the various state courts in which the necessity for co-operative action by agricultural producers was recognized as being essential to the general prosperity of the nation, used this language:

"It is stated without contradiction that co-operative marketing statutes substantially like the one under review have been enacted by forty-two states. • • • These statutes reveal widespread legislative approval of the plan for protecting scattered producers and advancing the public interest. Although frequently challenged, we do not find that any court has condemned an essential feature of the plan with the single exception of the Supreme Court of Minnesota in the above cited case."

In the case last quoted from the Supreme Court of the United States sustained the validity of the co-operative marketing statute of Kentucky and held that the state had the right to treat marketing contracts between the association and its members as of a separate class. The court said:

"The opinion generally accepted—and upon reasonable grounds, we think—is that the co-operative marketing statutes promote the common interest. The provisions for protecting the fundamental contracts against interference by outsiders are essential to the plan. This court has recognized as permissible some discrimination intended to encourage

agriculture. American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 105, 21 Sup. Ct. Rep. 43; Cox v. Texas, 202 U. S. 446, 50 L. ed. 1099, 26 Sup. Ct. Rep. 671. And in many cases it has affirmed the general power of the states so as to legislate as to meet a definitely threatened evil. International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 52 L. R. A. (N. S.) 525, 34 Sup. Ct. Rep. 859; Jones v. Union Guano Co., 264 U. S. 171, 68 L. ed. 623, 44 Sup. Ct. Rep. 280. Viewing all the circumstances, it is impossible for us to say that the legislature of Kentucky could not treat marketing contracts between the association and its members as of a separate class, provide against probable interference therewith, and to that extent limit the sometime action of warehousemen."

Presumably the legislature was moved by economic considerations in excepting agricultural products and live stock from the provisions of the statute. Indeed, the economic conditions to which reference has been made would seem to fully justify the conclusion that there was reasonable ground for believing that there were public considerations for making the exception. The legislature, in making the classification, was entitled to consider prevailing economic conditions and the differences between the classes in their relation to the ultimate object of the statute, which was the promotion of the general prosperity. We think that in view of the prevailing economic conditions at the time of the enactment of the statute it can not be said that the distinction made is unreasonable.

In concluding, we express the view that the dissenting opinion of Mr. Justice McKenna in the Connolly Case, when viewed in the light of present economic conditions, is a complete answer to the contention of the appellant that the statute is repugnant to the equal protection clause of the Fourteenth Amendment. Among other things, he said:

"What was the purpose of the Illinois statute, and what were the relations of its classes to that purpose? The statute was the expression of the purpose of the state to suppress combinations to control the prices of commodities, not, however, in the hands of the producers, but in the hands

of traders, persons, or corporations. Shall we say that such suppression must be universal or not at all? How can we? What knowledge have we of the condition in Illinois which invoked the legislation, or in what form and extent the evil of combinations to control prices appeared in that state? Indeed, whether such combinations are evils or blessings, or to what extent either, is not a judicial inquiry. If we can assume them to be evil because the statute does so, can we go beyond the statute and determine for ourselves the local conditions and condemn the legislation dependent thereon? But are there not, between the classes which the statute makes, distinctions which the legislature had a right to consider? Of whom are the classes composed? The excluded class is composed of farmers and stockraisers while holding the products or live stock produced or raised by them. The included class is composed of merchants, traders, manufacturers, all engaged in commercial transactions. That is, one class is composed of persons who are scattered on farms; the other class is composed of persons congregated in cities and towns, not only of natural persons, but of corporate organizations. In the difference of these situations, and in other differences which will occur to any reflections, might not the legislature see difference in opportunities and powers between the classes in regard to the prohibited acts. That differences exist can not be denied. To ascribe and contrast them might be invidious. To consider their effect would take us from legal problems to economic ones, and this demonstrates to my mind how essentially any judgment or action based upon those differences is legislative and can not be reviewed by the judiciary."

The judgment is affirmed.

CHRISTIAN, *Judge.*

(Delivered June 23, 1939).

The foregoing opinion of the Commission of Appeals has been examined by the Judges of the Court of Criminal Appeals and approved by the Court.

EXHIBIT "B"

From Harris County

No. 19333

Ex Parte HERBERT TIGNER

Opinion on Motion for Rehearing

The relator has filed a vigorous motion, evidencing dissatisfaction not only with the reasoning of the original opinion herein but also with the conclusion to which that reasoning inevitably led this court. The burden of his complaint seems directed at the phrase contained in the original opinion wherein it is said:

"While the rules by which the reasonableness of a classification adopted by the Legislature in dealing with economic policy may not change, it can not be said that supervening economic conditions may not render a classification reasonable which, under the conditions prevailing at a remote time, would have been purely arbitrary."

Although the law may be said to be changeless, nevertheless that which primarily evoked its enactment may have long since either changed or have been forgotten. The primary reason for the enactment of such law may have passed, but changing conditions, customs or environments might have caused its retention to become advisable, and it would still fulfill a duty and function to society. If so the usefulness of the law would surely continue, and would attach itself to the changed economic condition. An apt illustration might be that our penal statute against the carrying of arms exempted from its operation a person traveling; and such an exemption had been construed to mean, among other things, a person who was absent from home a day's journey, at such time of possibly thirty miles, and his return therefrom on the succeeding day. Changing economic conditions, however, at this day and time have supervened, and thirty miles is now but an hour's journey, and one taking such a journey would hardly be termed a traveler under such an exemption. By such phrase we could only mean that a classification being permissible, such must

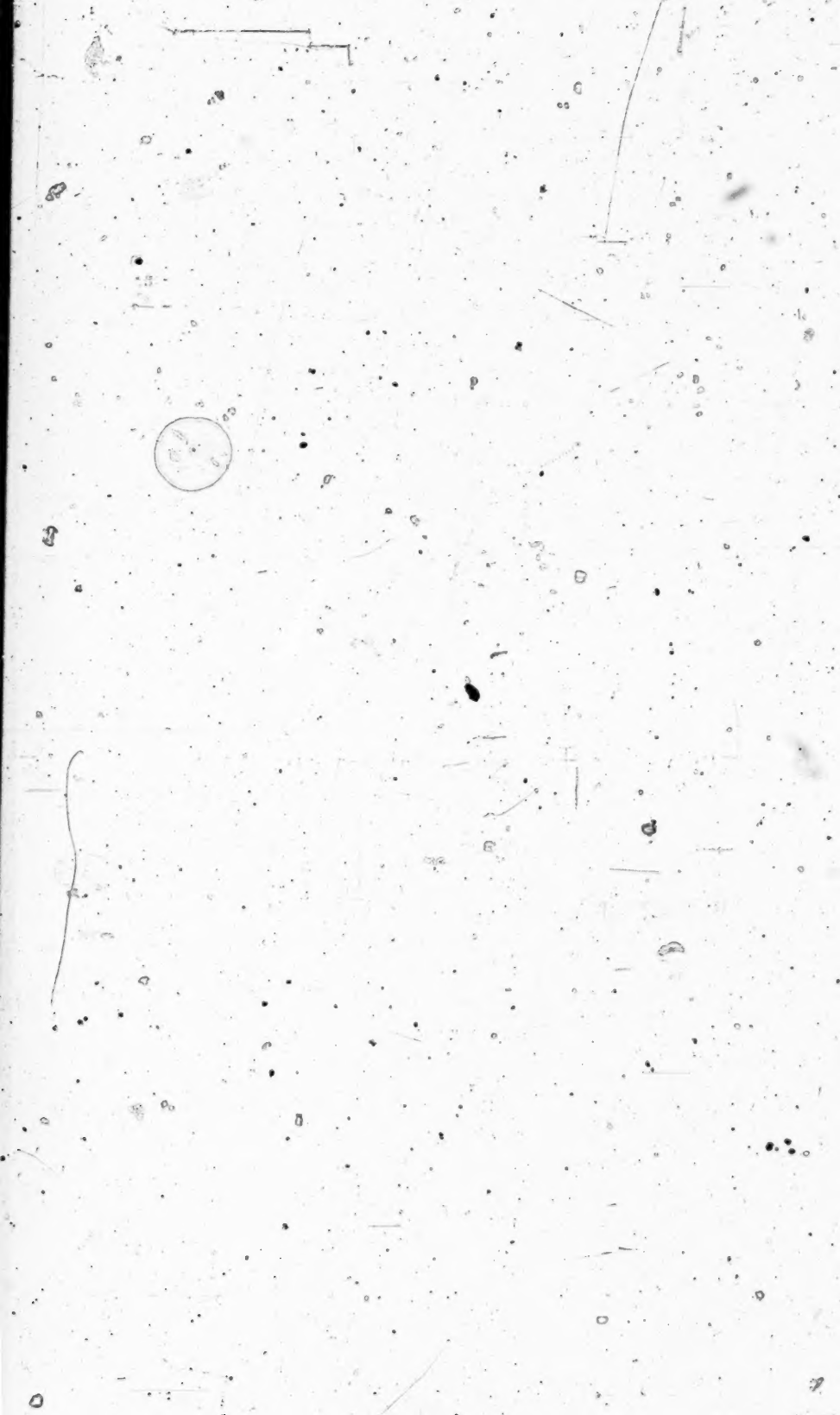
be reasonable and not palpably arbitrary, and under the exhaustive original opinion herein we think the reasonableness of this classification has been shown. Principles never change; it is only the application of such principles to the facts and conditions that authorize a change. That economic conditions govern largely in such an application of this anti-trust statute can not be denied. It concerns itself alone with such conditions. In the Connolly Case, decided March 10, 1902, the United States Supreme Court decided that an exemption of farmers and stock raisers from the provisions of the Illinois anti-trust law, while their products remained in their own hands, was an unreasonable and arbitrary classification, thus rendering such law obnoxious to the 14th Amendment to the U. S. Constitution. We therefore see that the vice found in such exemption lay only in what that court considered its unreasonableness. It is our present thought that the conditions then present have changed; that supervening economic conditions have enlarged upon the different position of one who has produced commodities absolutely necessary for the continuance,—not convenience,—of human life and its well-being, as contradistinguished from one who merely takes these necessities after their production and juggles with them for the purpose of taking a profit therefrom. Under such supervening economic conditions we still adhere to the herein expressed conclusions in the original opinion, that a reviewing court will look favorably upon the reasonableness of the classification that exempts farmers and stock raisers from the provisions of our anti-trust laws so long as their products remain in their own hands.

The original opinion herein was written after many months of careful research through many cases on the subject written by the major courts of the Union, as well as the United States Supreme Court, and we adhere to the views expressed therein.

The motion is overruled.

GRAVES, *Judge.*

(Delivered November 15, 1939)



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 635

HERBERT TIGNER, *Appellant*,

v.

THE STATE OF TEXAS

Appeal From the Court of Criminal Appeals of the State of Texas

BRIEF FOR APPELLANT

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II. The decisions referred to by the Court of Criminal Appeals of Texas in upholding the challenged statutes do not sustain the Court's conclusion that "in view of the supervening economic conditions since 1902" (the year the Connolly case was decided) the rule of law therein announced by the Supreme Court will not be ap-

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plied to the *palpable discrimination* which arises by reason of the exemption granted by this law to farmers and stockmen 28

III. When farmers and stockmen are exempt from the prohibitions of a criminal statute which is applicable to appellant, charged with a conspiracy thereunder to fix the price of beer, a *gross discrimination* is created by the State law, contrary to Section 1 of the Fourteenth Amendment to the United States' Constitution, and such a discrimination cannot be justified on the ground that the State has made a reasonable classification, because it is not based on anything having relation to the purpose for which it is made . . . 40

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 635

HERBERT TIGNER, *Appellant*,

v.

THE STATE OF TEXAS

Appeal From the Court of Criminal Appeals of the State of Texas

BRIEF FOR APPELLANT

Opinions Below

The opinion of the Court of Criminal Appeals (R. 11) is reported in 132 S.W. (2d) 885. The opinion on motion for rehearing (R. 33) is reported in 132 S.W. (2d) 897.

Jurisdiction

The judgment of the Court of Criminal Appeals became final on November 15, 1939, upon the overruling of appel-

lant's motion for rehearing (R. 35). The petition for appeal was filed in the Court of Criminal Appeals of Texas on December 12, 1939 (R. 35), and was allowed by F. L. HAWKINS, Presiding Judge of the Court of Criminal Appeals of Texas, on December 12, 1939 (R. 40). Thereafter, on January 11, 1940, appellant filed in the Supreme Court of the United States a transcript of the record, and separately presented a Statement as to Jurisdiction; and on January 29, 1940, an order was entered in this Court noting probable jurisdiction.

The jurisdiction of this Court is invoked under Section 237(a) of the JUDICIAL CODE, as amended (28 U.S.C.A. 344).

Statement of the Case

An indictment was returned in the Criminal District Court No. 2 of Harris County, Texas, charging appellant with the felony offense of entering into a conspiracy to fix the retail price of beer in violation of the provisions of Chapter 3, Title 19, PENAL CODE OF THE STATE OF TEXAS, 1925. After his arrest and incarceration, he presented a petition to the judge of said court praying for a writ of habeas corpus, contending that the indictment was void because the statute upon which it was predicated was repugnant to Section 1 of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES in that it exempted from its operation "agricultural products and livestock while in the hands of the producer or raiser." At the hearing, appellant was remanded to the custody of the sheriff of Harris County, Texas, to await trial upon the indictment. He prosecuted an appeal to the Court of Criminal Appeals of Texas, the court of last resort in criminal cases, where the judgment of the District Court was affirmed on June 23, 1939. Appellant's motion for re-

hearing was overruled by the Court of Criminal Appeals on November 15, 1939, and the judgment became final on said date.

Question Presented

This appeal presents the single question whether Chapter 3, Title 19 of the PENAL CODE OF THE STATE OF TEXAS, 1925 (the criminal antitrust statute) deprives appellant of his liberty without due process of law and denies to him the equal protection of the laws guaranteed by Section 1 of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES by reason of the exemption of "agricultural products and livestock while in the hands of the producer or raiser."

The decision of the Court of Criminal Appeals was in favor of its validity, contrary to the decision of this Court in CONNOLLY v. UNION SEWER PIPE COMPANY, 184 U.S. 540, 46 L. Ed. 679, which involved a statute of the State of Illinois (Act of July 1, 1893, copied at length in the opinion), which in essential respects is the same as the Texas statute now under review.

Statute Involved

The statute, which is a part of the Penal Code of 1925, is set out at length in the original opinion of the Court of Criminal Appeals (R. 12-17), but the pertinent portions thereof are as follows:

> "Article 1632. A 'trust' is a combination of capital, skill, or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for any or all of the following purposes * * *
>
> 2. To fix, maintain, increase or reduce the price of merchandise, produce, or commodities, or the cost of in-

surance, or of the preparation of any product for market or transportation."

"Article 1635. Whoever violates any provision of this chapter shall be confined in the penitentiary not less than two nor more than ten years."

"Article 1637. If any person shall enter into an agreement or understanding of any character to form a trust, or to form a monopoly, or to form a conspiracy in restraint of trade, as these offenses are defined in this chapter, or shall form a trust, monopoly or conspiracy in restraint of trade, or shall be a party to the formation of a trust or monopoly or conspiracy in restraint of trade, or shall become a party to a trust or monopoly or conspiracy in restraint of trade, or shall do any act in furtherance of or aid to such trust or monopoly or conspiracy in restraint of trade, he shall be confined to the penitentiary not less than two nor more than ten years."

"Article 1642. NO PROVISION OF THIS LAW SHALL APPLY TO AGRICULTURAL PRODUCTS OR LIVESTOCK WHILE IN THE HANDS OF THE PRODUCER OR RAISER." * * *

History of the Statute

The pertinent legislative and judicial history of the several Antitrust Acts of Texas may be briefly summarized as follows:

The first statute was enacted in 1889 [1] (Acts of the Twenty-First Legislature, Ch. 117, p. 141). It exempted "agricultural products or livestock while in the hands of the pro-

[1]The Texas law was among the first passed by the various States, being preceded only by the Maine Law approved March 2, 1889, and the Kansas Law approved March 12, 1889. The Texas Act became effective April 30, 1889. The Illinois Act, approved July 1, 1893, copied from the Texas Act, was held unconstitutional in Connolly v. Union Sewer Pipe Company, 184 U.S. 540. The Texas statute had previously been held unconstitutional in In re Grice, 79 Fed. 627. The exemption clauses in the Illinois and Texas Acts are identical. Similar exemption clauses were included in many other State statutes, such as Georgia, declared unconstitutional in Brown v. Jacobs Pharmacy, 41 S.E. 553, and Montana, declared unconstitutional in State v. Cudahay Packing Company, 82 Pac. 833.

ducer or raiser."[2] It was amended by an Act approved April 30, 1895, but the Amended Act carried the same exemptions as the Act of 1889, and in addition exempted laborers organized "for the purpose of maintaining any standard of wages." The Act of April 30, 1895, along with certain provisions of the Act of 1889, were made a part of the REVISED CIVIL STATUTES OF 1895, Articles 5313 to 5321a, and also a part of the Penal Code of 1895, Articles 976 to 988d.

The exemption of "livestock and agricultural products" appears in the REVISED CIVIL STATUTES OF 1895, as Article 5320, and in the PENAL CODE OF 1895, as Article 988.[3]

In 1899 (Acts of 1899, p. 246) the Legislature of Texas again amended the Antitrust Law. Such is known as the Antitrust Law of 1899 (Laws of the Twenty-Sixth Legislature, p. 246). Section 14 of this law provided that "this Act shall be held and construed to be cumulative to all laws now in force in this State." However, the State courts, in construing this statute, held that the provision to the effect that it was "cumulative" of all laws "now in force" did not revive and make part of it, the arbitrary exemption provisions of the unconstitutional Act of 1895 and the Codes of 1895; that these two laws, enacted four years apart, did not constitute "one and the same law." See STATE v. LAREDO ICE COMPANY, 96 Tex. 461, 466, and the opinion of CHIEF JUSTICE FISHER in STATE v. SHIPPERS COMPRESS AND WAREHOUSE COMPANY, 67 S.W. 1049, 1056. This construction of the State statute was adopted and applied in NATIONAL COTTON OIL

[2]The 1889 statute is set out in the case of Queen Insurance Company, et al., v. The State of Texas, 86 Tex. 250 (1893), wherein the Supreme Court, after pointing out certain defects in the Act, decided that it did not embrace the business of insurance. This decision lead to the subsequent amendments made in 1895.

[3]The 1895 statutes are set out in Waters-Pierce Oil Co. v. State, 19 T.C.A. 1, 44 S.W. 936 (1898), decided prior to the Connolly case (1902).

COMPANY v. TEXAS, 197 U.S. 115, 132, 133. A separate Act (Act of 1899, p. 262) was also passed by the Twenty-Sixth Legislature of Texas, authorizing "all persons engaged in any kind of work or labor, manual or mental, or both, to associate themselves together and form trade unions and other organizations," for the purpose of improving working conditions, and providing that their activities should not be unlawful. This act was declared valid in WATERS-PIERCE OIL COMPANY v. STATE, 106 S.W. 918, 929. In changed form the Act now appears in the REVISED STATUTES OF 1925 as Articles 5152-5154, inclusive, and in the REVISED CRIMINAL STATUTES OF 1925 as Articles 1642 to 1644, inclusive.

In 1902 this Court held the Illinois Antitrust Act, which was a copy of the 1889 Texas Act, unconstitutional because of the exemption of agricultural products and livestock. CONNOLLY v. UNION SEWER PIPE COMPANY, 184 U.S. 540. Thereafter (June, 1902) the Supreme Court of Texas, following the law as announced by the Supreme Court of the United States in the CONNOLLY case, held the Texas Law of 1895 unconstitutional because of the aforesaid exemption. STATE v. SHIPPERS COMPRESS AND WAREHOUSE COMPANY, 95 Tex. 603, 69 S.W. 58.

This was the state of the record on trust legislation until the Legislature adopted the Act of 1903 (General Laws, p. 119). This Act, approved March 31, 1903, recited as an emergency the fact that the Antitrust Laws had been held to be unconstitutional, undoubtedly referring to the CONNOLLY case decided by the United States Supreme Court on March 10, 1902. It specially repealed, eo nomine, all previous acts on the subject of trusts, except the Exemption Act of 1899 (General Laws, 1899, p. 262). The Antitrust Act of 1903 contained no exemption, and, while repealing previous legislation, except the Exemption Act of 1899, undertook to pre-

serve all prior accrued penalties and forfeitures for violations of the repealed Acts.[4]

In 1907 another Act on the subject of trusts was passed but it is almost entirely procedural (General Laws of 1907, p. 456). In the same year the Legislature of Texas also passed a law authorizing a revision of the Revised Statutes, details of which are unnecessary to state.

In 1909 another Act was passed on the subject of revision (General Laws, p. 130). For the purpose of this brief it is unnecessary to note the details of that Act. A revision of the statutes under these Acts, however, resulted in the Antitrust Law then existing being placed in the REVISED CIVIL STATUTES OF TEXAS, commencing with Article 7796, which, with the balance of the revision, was embodied in the bill which was duly adopted by the Legislature. In the final title, Section 16 provided that: "The provisions of the REVISED STATUTES, so far as they are substantially the same as the Statutes of this State in force at the time when the REVISED STATUTES shall go into effect, or as the common law in force in this State at said time, shall be construed as continuations thereof, and not as new enactments of same." In the REVISED CIVIL STATUTES OF 1911, this Exemption Act of 1899, relating to labor unions, appears as Articles 5244 to 5246, but in the REVISED CIVIL STATUTES OF 1911 no exemption was given to agricultural products and livestock "while in the hands of the producer or raiser." The same Commission, however, prepared and submitted, and the same Legislature adopted the revision of the PENAL CODE and CODE OF CRIMINAL PROCEDURE. The antitrust provisions contained in the PENAL CODE were in substance and effect the same as the prohibitions contained in the

[4]The history of the Act and subsequent antitrust legislation in Texas will be found in State v. Standard Oil Co., et al., 82 S.W. (2d) 402 (1935). This decision was reversed by the Supreme Court of Texas (103 T. 313, 107 S.W. (2d) 550), but the history of antitrust legislation in Texas, set forth in the opinion, is accurate and informative.

REVISED CIVIL STATUTES, except that Article 1477 of the PENAL CODE exempted "agricultural products or livestock while in the hands of the producer or raiser."

After the adoption of the REVISED STATUTES OF 1911, there was no further trust legislation of any importance which affects the question under immediate consideration until the adoption of the REVISED STATUTES OF 1925. In 1923 (General Laws, p. 338) the Legislature passed an act providing for another revision of the laws of the State of Texas. For the first time in the history of such Commissions, the Governor was required to appoint persons who had the qualifications of Judges of the Supreme Court. Among other things it was provided, as to said Commissioners:

> * * * "They shall harmonize conflicting statutes, or parts thereof, by rewriting, omissions, or additions, and shall generally make such changes, additions or omissions as they may deem necessary to reduce in volume the general statutes of the State and make them harmonious, plain, concise and *complete*."

This Commission presented to the Legislature a report along with the Revised Statutes prepared as a bill. The report declared:

> "We have omitted from the revision all obsolete statutes and those declared unconstitutional and void, by our Supreme Court and by the Supreme Court of the United States."

And again, on page 2 of the report:

> "We have arranged the laws relating to labor, both the civil and criminal, under separate titles, in each case plainly stating the law so as to effect its object and give the intended protection to those in whose behalf the laws were created."

And again, on page 3 of the report:

> "The laws relating to agriculture, including the marketing of agricultural products and those relating to warehouses, weighers, etc., have been carefully revised and codified."

Thus we see nothing was done by "inadvertence or mistake." The whole work of revision was the deliberate judgment of the Commission.

Under Title 126 of the REVISED CIVIL STATUTES, 1925, on the subject of trusts, monopolies, and conspiracies against trade, beginning with Article 7426, we find that Article 7426 is a literal copy of Article 7796 of the REVISED CIVIL STATUTES OF 1911; Article 7427 is a copy of Article 7797; Article 7428 is a copy of Article 7798; Article 7429 is a copy of Article 7799; Article 7430 is substantially Article 7800; and thence on through, including the procedural provisions, there are no substantial changes in the two. There is no exemption as to agricultural products and livestock *in the* CIVIL STATUTES OF 1911 and *none in the* CIVIL STATUTES OF 1925.

The revision of the Penal Code, however, presents some very different aspects; it is not a copy of the chapters on the same subject, taken from the PENAL CODE OF 1911, but shows a careful and complete revision of the laws which is obviously the judgment of the Commission based on mature consideration, and can in no sense be considered *inadvertent*. Chapter 3 of Title 19 of the PENAL CODE OF 1925, takes up the so-called "antitrust laws" in the same manner in which they are handled in the Civil Statutes. Article 1632 is a copy of Article 7426 REVISED STATUTES; Article 1633 is a copy of Article 7427; Article 1634 is a copy of Article 7428; the extended procedural provisions of the Civil Statutes are materially reduced in the Penal Code. Much of the contents of the PENAL CODE, 1911, is omitted, much more is changed, edited and rearranged, and the exemptions are carefully rewritten.

Article 1642 of the PENAL CODE, 1925, provides:

> "No provision of *this law* shall apply to agricultural products or livestock while in the hands of the producer or raiser. It shall be lawful for any person engaged in any kind of work or labor, manual or mental, or both, to associate with other such persons to form trades unions and other organizations for the purpose of protecting themselves in their personal work, personal labor, and personal service, in their respective pursuits and employments." (Italics ours.)

Article 1643 exempts trades unions. The general repealing clause of the PENAL CODE, 1925, declared that "all laws and parts of laws relating to crime omitted from this Act *have been intentionally omitted,* and *all additions have been intentionally added;* and this Act shall be construed to be *an independent Act of the Legislature,* enacted under the caption hereof and the articles contained in this Act as rewritten, changed, combined, and codified, *shall not be construed as a continuation of former laws,* except as otherwise herein provided." (Italics ours.) This is the direct antithesis of the final title to 1911, supra, and is conclusive in determining the legislative intent as to the 1925 revision.

This declaration of legislative intent left nothing to construction. The Legislature says it has left nothing to chance or inadvertence; what it has said it has deliberately said as an expression of its judgment, and if there be any mistake it is a mistake of judgment.

With reference to the matter immediately under discussion, the declaration that all *"additions were intentionally made and all omissions intentionally omitted,"* shows the closest scrutiny on the part of the codifiers with reference to the exemptions under consideration. An analysis of the statutes is most convincing of the verity of the Commission's declaration of deliberate consideration of all changes made.

Article 1642 of the PENAL CODE OF 1925 is not an exact copy of Article 1477, PENAL CODE, 1911, but shows conclusively a careful and painstaking consideration on the part of the codifiers, and shows that so far as the Commission was concerned there was no lack of consideration of the subject matter. The same is true with reference to Article 1643, PENAL CODE, which is not a copy of Article 1478 in the CODE OF 1911, nor is Article 1644 a copy of Article 1479 in the CODE OF 1911. The three Articles in the CODE OF 1925 show careful and painstaking consideration and show that the Legislature in declaring changes to be intentionally made, and not lapses, not inadvertences, nor unconscious changes, was fully aware of the changes made; and as to the particular articles under consideration the most deliberate and careful consideration was given to each of them.[5]

The effect of the revision of the State statutes was fully discussed by CHIEF JUSTICE CURETON in AMERICAN INDEMNITY COMPANY v. CITY OF AUSTIN, 246 S.W. 1019, 1025, where he said:

> "But the Revised Statutes, as we have seen, are the law, and are to be looked to with safety and confidence by the citizen * * * "

See also STEVENS v. STATE, 70 Tex. Cr. R. 565, 159 S.W. 505; LONG v. STATE, 3 S.W. (2d) 448; and JOHNSON v. STATE, 283 S.W. 807, to the same effect.

The Supreme Court of Texas in the case of STATE v. STAND-

[5]Article 1, Section 3 of the Act of the Legislature adopting the Penal Code and the Code of Criminal Procedure of Texas, 1925, expressly repeals all penal laws not embraced in the Act, and declares, in the strongest possible language, that all "additions" have been **intentionally** added, and all "omissions" have been **intentionally** omitted, and "this Act shall be construed to be an independent Act of the Legislature enacted under the caption hereof, and the articles contained in this Act, as revised, rewritten, changed, combined and codified shall not be construed as a continuation of former laws, except as otherwise herein provided."

ARD OIL COMPANY, 107 S.W. (2d) 550 (decided June 16, 1937), ruled that the REVISED CIVIL STATUTES and the PENAL CODE, adopted in 1925, are distinct enactments and the validity of one is in no way dependent on the validity of the other. This decision contains a brief history and résumé of the State Antitrust Laws and sustains the validity of the REVISED CIVIL STATUTES OF 1925, which did not contain the agricultural and livestock exemption appearing in the Penal Statutes, the validity of which are challenged in this case.

This appeal presents the first attack upon the Antitrust Statutes embodied in the PENAL CODE OF THE STATE OF TEXAS, 1925, on the ground of their inequality under the FOURTEENTH AMENDMENT.

Specifications of Error to Be Urged

(1)—Chapter 3, Title 19, PENAL CODE OF THE STATE OF TEXAS, 1925, defining trusts, monopolies and conspiracies in restraint of trade, is unconstitutional and void as repugnant to Section 1 of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, because, by reason of the exemption from its operation and the pains and penalties therein prescribed of "agricultural products and livestock while in the hands of the producer or raiser" appellant is denied the equal protection of the State laws (R. 41).

(2)—The Court of Criminal Appeals of Texas erred in refusing to follow the decision of the Supreme Court of the United States in the case of CONNOLLY V. UNION SEWER PIPE COMPANY, 184 U.S. 540, in which it was adjudicated that a statute of the State of Illinois, identical in all essential particulars with the statute of the State of Texas, and which specifically exempted from its operation "agricultural products and livestock while in the hands of the producer or raiser," was unconstitutional as repugnant to the "due process" and "equal protection" clauses of Section 1 of the

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (R. 42).

Summary of Argument

I.

The decision of the Supreme Court of the United States in CONNOLLY v. UNION SEWER PIPE COMPANY, 184 U.S. 540, is decisive of the question involved in the case. *The exemption provision of the Illinois statute was identical* with that contained in Article 1642, Chapter 3, Title 19 of the PENAL CODE OF THE STATE OF TEXAS, 1925, and the same logic which required this Court to invalidate the Illinois statute requires the invalidation of the Texas statute. This decision has been followed by the Supreme Court for thirty-eight years, has been approved many times, and has never been overruled or modified.

II.

The decisions referred to by the Court of Criminal Appeals of Texas in upholding the challenged statutes do not sustain the Court's conclusion that "in view of the supervening economic conditions since 1902" (the year the CONNOLLY case was decided) the rule of law therein announced by the Supreme Court will not be applied to the *palpable discrimination* which arises by reason of the exemption granted by this law to farmers and stockmen.

III.

When farmers and stockmen are exempt from the prohibitions of a criminal statute which is applicable to appellant, charged with a conspiracy thereunder to fix the price of beer, a *gross discrimination* is created by the State law, contrary to Section 1 of the FOURTEENTH AMENDMENT TO THE UNITED

STATES CONSTITUTION, and such a discrimination cannot be justified on the ground that the State has made a reasonable classification, because it is not based on anything having relation to the purpose for which it is made.

Argument

I.

The case of CONNOLLY v. UNION SEWER PIPE CO., 184 U.S. 540, 46 L. Ed. 679, decided by the Supreme Court of the United States on March 10, 1902, decides the issue involved in this appeal. The opinion in this case was written by MR. JUSTICE HARLAN. All judges participating in the decision of the case were in accord with this opinion, except MR. JUSTICE MCKENNA, who filed a dissenting opinion. No case can be found in the records where the opinion of the court in this case, which for thirty-eight years has been a landmark in constitutional law, has been overruled, modified or limited upon the important question involved therein. A study of subsequent cases discloses that this decision has been cited one hundred forty-two times in opinions written by the United States appellate courts; and in none of these opinions has there been given any intimation that the sound doctrine of constitutional law therein announced should be repudiated. The decision of the Court of Criminal Appeals of Texas in this case is the first decision which counsel have been able to find which challenges the authoritative pronouncements contained in this important decision, which vitalizes the equal protection clause of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, protecting alike the poor and the rich, the weak and the powerful, from the arbitrary action of State Legislatures, when an attempt is made to deny any person the equal protection of the law.

The antitrust statute of the State of Illinois, adopted June

20, 1893, was patterned after the Texas antitrust act, adopted April 20, 1889. Section 9 of this Act (184 U.S. 554) specified:

> "Sec. 9. The provisions of this Act shall not apply to agricultural products or livestock while in the hands of the producer or raiser."

This provision of the Illinois statute, which formed the basis for the court's decision in the CONNOLLY case, is practically identical with Article 1642, Chapter 3, Title 19, PENAL CODE OF THE STATE OF TEXAS, 1925, which reads as follows:

> "Art. 1642. No provision of this law shall apply to agricultural products or live stock while in the hands of the producer or raiser. * * * "

The livestock and agricultural business in the State of Texas constitutes a major enterprise of that State. Millions of dollars are invested in these two important enterprises, and millions of people are employed therein. These industries were major industries in the State of Illinois at the time the CONNOLLY case was decided. The language of the majority opinion in this case constitutes a complete refutation of the opinion of the Court of Criminal Appeals of Texas, wherein it was held that the Texas Act did not violate Section 1 of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. The words used by JUSTICE HARLAN should stand as the law of this country, so long as freemen desire to be protected from arbitrary discriminations made by a transient State legislative majority. The court said:

> "Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise, or commodities, whereby such combinations may, for their benefit exclusively, control or establish

prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturalists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the 9th Section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State.

"We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

The binding force and effect of this decision was recognized by the Supreme Court of Texas in the case of STATE v. SHIP-

PERS' COMPRESS & WAREHOUSE CO., 69 S.W. 58, 61 (June 19, 1902), wherein JUSTICE BROWN said:

> "We recognize the superior authority of the Supreme Court of the United States upon this question, and in obedience to its decision we shall hold that, in so far as the law of 1895 comes within the terms of the Connolly case, it is invalid; that it will not support an action by the State to recover a penalty for a violation of the law, nor will it, in suits between corporations or individuals, support a defense based upon the fact that the right of action originated in a violation of the antitrust law."

Appellant, in his conduct as a citizen, should have a right to rely upon the certainty of the criminal law of his State, both the Supreme Court of the United States and the Supreme Court of Texas having declared that such an exemption as that embodied in Article 1642 of the TEXAS PENAL CODE invalidates the statute. He should not be required to answer an indictment charging him with violating a law which has expressly been held to be unconstitutional by decisions of the highest court of the State, as well as by the highest court of his country.

The CONNOLLY case announced no new and novel doctrine. It merely applied the prohibitions of Section 1 of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES to a patent discrimination which was made by the Illinois antitrust statutes. The equal protection clause of the FOURTEENTH AMENDMENT was designed to prevent just exactly that thing which the Illinois Legislature and the Texas Legislature have attempted to accomplish,—gross discrimination without any reason or justification therefor. As was said in the case of BARBIER v. CONNOLLY, 113 U.S. 27, 32, 28 L. Ed. 923, 925, 5 Sup. Ct. Rep. 357, in regard to this section of the FOURTEENTH AMENDMENT:

> "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment."

The same thought was expressed in HAYES v. MISSOURI, 120 U.S. 68, 71, 30 L. Ed. 578, 580, 7 Sup. Ct. Rep. 350, wherein it was said that the FOURTEENTH AMENDMENT:

> "* * * does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

The criminal antitrust statutes of Texas, as embodied in Chapter 3, Title 19, PENAL CODE OF THE STATE OF TEXAS, 1925, do not measure up to this test, nor did the antitrust statutes of the State of Illinois measure up to such requirements. The object of the Texas antitrust laws is to encourage competition and prevent the evils incident to price fixing and other acts expressly forbidden thereby. With this object in mind, the State of Texas makes stock raisers and farmers subject to the civil penalties prescribed by the civil antitrust statutes of Texas (STATE v. STANDARD OIL CO., ET AL., 130 Tex. 313, 107 S.W. (2d) 550). Like all other citizens, they are forbidden to form trusts, monopolies or conspiracies in restraint of trade. The price fixing agreements of farmers, under the civil statutes, are illegal, just as similar contracts made by other citizens. Thus, by the declared policy of its civil statutes, the State of Texas recognizes that *it is undesirable, from the standpoint of the public, to permit monopolies, trusts and conspiracies in restraint of trade by any class of Texas citi-*

zens. Yet, thus recognizing the public evil resulting therefrom, the Legislature of the State of Texas exempts this politically powerful class from the pains and penalties prescribed by the penal statutes of the State for those violating the criminal antitrust statutes, while all other classes of citizens, similarly situated, are subjected to the penalities prescribed by our penal statutes. This Court in BARBIER v. CONNOLLY, supra, speaking unanimously through JUSTICE FIELD, said (113 U.S. 31, 28 L. Ed. 924):

> "The Fourteenth Amendment * * * undoubtedly intended * * * that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

Such a clear and logical statement sounds like common sense as well as good law. Now, what justification in logic or in law can be offered for a State policy which makes an act criminal if committed by a merchant or a manufacturer but not a crime if committed by a ranchman or farmer? It is a matter of common knowledge, of which this court may take judicial notice, that there are many large ranches in the State of Texas. The owners of these ranches may agree that they will not sell their cattle for less than ten cents a pound. This agreement would be a violation of the civil antitrust laws of Texas, and the ranchmen making this agreement, provided the Attorney General of the State of Texas thought it not politically inexpedient, could be subjected to such penalties as are prescribed by the civil antitrust statutes. Articles 7426, 7427, 7428, 7429, 7436, 7437, Title 126, VERNON'S TEXAS CIVIL STATUTES, 1925 (Vol. 20, pages 609-639, incl.). No such suit could be brought against these particular price-fixers except with the consent of the Attorney General of Texas, who is an elected official. No grand jury could indict these ranchmen for a criminal offense, because they are exempt

from prosecution under the criminal antitrust statutes, because of the provisions of Article 1642. Their illegal act is not a crime. The same illegal act committed by a merchant, manufacturer, salesman or other citizen, not a farmer or a ranchman, is a crime. The grand jury in the county wherein this particular price-fixing agreement was made could not indict these ranchmen like appellant, Herbert Tigner, was indicted, because they occupy a favored position by reason of the exemption privileges accorded them by Article 1642; but a grand jury in the same county could indict any other group of citizens in that county who made a similar agreement, such, for example, as this appellant and his associates. The Attorney General of Texas would have no voice in what a grand jury might do with respect to appellant and his associates, because proceedings under the criminal law are not subject to the judgment and discretion of the Attorney General of Texas. But the same grand jury could do nothing with respect to a like price-fixing agreement made by farmers or stockmen, because of the exemption accorded such favored class by Article 1642 of the PENAL CODE; and no action under the civil antitrust statutes could be taken against this favored group for agreeing upon a price for their products, unless the Attorney General of Texas, an elected official of that State, consented that such a suit might be instituted by the State of Texas. (Article 7436, Title 126, VERNON'S TEXAS CIVIL STATUTES, Vol. 20, page 638.) Such a proceeding has never occurred and probably never will occur in Texas. If any sound reason can be advanced for such a legislative descrimination, counsel for appellant have never heard it; and it does not appear from anything that has been said in briefs heretofore filed in this case or in the opinion of any judge who has attempted to justify the unwarranted discrimination created by Article 1642.

The opinion of the Court of Criminal Appeals of Texas,

written by JUDGE CHRISTIAN, says (13[illegible] S.W. (2d) at p. 895):

> "Bearing in mind that the statute is concerned with economic policy, the only question is whether we can say in our judicial knowledge that the Legislature could not have had *any reasonable ground* for believing that there were *public considerations* for the distinction made by the statute." (Italics ours.)

How could there be "any reasonable ground" for the Court of Criminal Appeals of Texas or this Court to believe that there were "public considerations" for the gross discrimination apparent in the Texas antitrust laws where this situation exists,—a situation which we again describe for the sake of emphasizing the patent injustice thereof, as a discrimination coming within the purview of the First section of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

Farmers and ranchmen (along with all other persons and corporations), under the REVISED CIVIL STATUTES OF THE STATE OF TEXAS, 1925 (Title 126, VERNON'S TEXAS CIVIL STATUTES), are prohibited from making price-fixing agreements. STATE v. STANDARD OIL, ET AL., 103 Tex. 313, 107 S.W. (2d) 550. If the Attorney General of Texas, an elective public official, desires to institute a civil suit against such a group entering into such an agreement, he is permitted to do so; but no other public official could institute the suit. If these farmers and ranchmen were convicted, they would be subject to a fine of not less than fifty and not more than fifteen hundred dollars for each and every day during which such price-fixing agreement continued. (Article 7436, VERNON'S TEXAS CIVIL STATUTES, 1925.) All other classes of citizens are subject to the same civil statute. However, the ranchmen and farmers, making this price-fixing agreement, would not be subject to the Texas criminal antitrust statutes (Chapter 3, Title 19,

PENAL CODE), because they are expressly exempt from prosecution by Article 1642 of the PENAL CODE. All other classes of people, including appellant and those similarly situated to him, are subject, *for making like agreements*, to the pains and penalties prescribed by the penal laws of the State of Texas. Herbert Tigner, the appellant, may be sent to the penitentiary of Texas for not less than two nor more than ten years (Article 1640, Chapter 3, Title 19, PENAL CODE OF THE STATE OF TEXAS), because he conspired to fix the price of beer. A grand jury in Harris County, Texas, can indict him for this crime. The District Attorney can prosecute the case. And Tigner, if found guilty, may serve ten years in the State penitentiary for this crime. If, however, being a ranchman, he had conspired to fix the price of cattle, or being a farmer, he had conspired to fix the price of wheat, he cannot be indicted by a grand jury of Harris County, Texas; he cannot be tried by the District Attorney of that county or any other county, because he would have committed no offense against the laws of the State of Texas, as, under these circumstances, he falls in that favored and protected class guaranteed immunity by the provisions of Article 1642 of the PENAL CODE. Can this gross discrimination be justified on the grounds of any "public consideration" mentioned in the opinion of the Court of Criminal Appeals (R. 29)? Can this gross discrimination be justified on "any reasonable ground" as mentioned by the Court of Criminal Appeals in its opinion (R. 29)? There can be no reasonable grounds for such a discrimination, and there is no public consideration which justifies such an arbitrary distinction; and for that very definite reason Chapter 3, Title 19, of the PENAL CODE OF THE STATE OF TEXAS comes within the inhibition of the first section of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. *It gives an exemption to a favored class without any reasonable basis for such a classification* The exemption granted by its provision is a purely

arbitrary one, not based on any reasonable grounds or justified by any public considerations. It has been expressly condemned by the Supreme Court of the United States in the CONNOLLY case, supra, and scores of other analogous cases following this decision.

JUDGE CHRISTIAN, writing the opinion for the Court of Criminal Appeals of Texas, further says (132 S.W. (2d) at p. 896):

> "The necessity for the enactment of legislation designed to stabilize the prices of agricultural products and thereby promote the public interest grew out of intolerable economic conditions of which judicial notice has been taken by the courts of various States of the Union" (R. 29).

After reviewing to some extent the legislative and judicial history of coöperative marketing acts (R. 29-32, incl.), JUDGE CHRISTIAN further said (132 S.W. (2d) at p. 897):

> "Presumably the Legislature was moved by economic considerations in excepting agricultural products and live stock from the provisions of the statute" (R. 32).

The Court of Criminal Appeals of Texas was simply blind to existing facts, or else it would not have made this astonishing statement as a justification for the exemption granted by Article 1642. We have pointed out that the Legislature of Texas, in the REVISED CIVIL STATUTES OF THE STATE OF TEXAS, 1925, makes illegal price-fixing contracts affecting agricultural products and live stock, while in the hands of the producer. Such contracts are not only illegal by the civil law, but the parties making such contracts are subject to the penalties prescribed by Article 7436, Title 126, VERNON'S TEXAS CIVIL STATUTES. It is clear, therefore, that economic considerations did not cause the Legislature to except farmers and stockmen from the criminal antitrust laws of Texas, be-

cause they are not excepted from the civil antitrust laws. It is clear that the Legislature did *not*, as suggested by the Court of Criminal Appeals, consider "the differences between the classes in their relation to the ultimate object of the statute" (R. 32), because there exists no difference between the classes in their relation to the ultimate object of the statute. The object of the statute is quite clear:—in this instance punishment for price-fixing and other forbidden acts. Ranchmen and farmers have the same relationship towards this object as appellant and his associates. Their only difference is a difference in occupations, in each of which price fixing agreements are illegal under the civil laws of Texas. It is impossible for any reasonable person to claim that any of the foregoing grounds, suggested in the opinion of the Court of Criminal Appeals, constitutes a reason for making the exemptions, concerning which appellant complains, because if the Legislature desired to promote the economic prosperity of farmers and stock raisers, and if the Legislature deemed that the economic welfare of these classes would be promoted by exempting them from the prohibitions and penalties of the criminal statutes, then is it not passingly strange that price-fixing contracts of farmers and stockmen are made illegal by the civil statutes? Exemption from criminal prosecution could not possibly promote their economic welfare, when their contracts were illegal under the civil statutes. To suggest such as a possible explanation appears absurd and ridiculous on its face.

The mere statement of this existing situation discloses to what lengths the Texas Court of Criminal Appeals was willing to go in upholding this exemption as a reasonable classification. It was grasping at straws which are insufficient to support the weight of any reasonable examination. How could this exemption prescribed by Article 1642 of the PENAL CODE promote the economic welfare of farmers and stockmen, when the civil statutes of Texas made illegal the contracts which the Court of Criminal Appeals of the State of

Texas says that it might have been the policy and purpose of the Legislature of Texas to foster and promote? Such a suggestion serves only to emphasize the outrage which appellant feels when he observes a state of the law under which he, a citizen of Harris County, Texas, may be indicted and confined in the penitentiary of the State of Texas for ten years for conspiring to fix the price of beer, while wealthy ranchers and stockmen in the same county can conspire to fix the price of cattle and cotton and be immune from any kind or character of prosecution under the penal laws of the State of Texas, because, forsooth, the Legislature of Texas, in its wisdom, has seen fit to grant to this politically potent class an exemption from the pains and penalties of the criminal statutes by the provision contained in Article 1642 of the PENAL CODE OF TEXAS, that "agricultural products and livestock while in the hands of the producer or raiser" shall not be the subject of criminal prosecution under this statute.

We repeat:—If it is a crime for appellant to engage in activities looking towards fixing a price for beer in Harris County, then there is and can be no logical reason why it should not be a crime for farmers and stockmen to fix the price of cattle and cotton. It will not be argued that beer, cosmetics, tooth picks, or chewing tobacco are of more importance to the public than cattle and cotton. It cannot be argued that this exemption promotes the welfare of farmers and stockmen, when the civil statutes of Texas make their price-fixing contracts illegal and subject the parties thereto to civil penalties.

Viewing the matter from any angle, one necessarily arrives at the conclusion that the classification attempted by the Legislature of Texas is a purely arbitrary classification, without any reasonable basis, and that it does not rest upon any *ground of difference* between the included and the excluded classes *which has any fair and substantial relation to the ob-*

ject of the legislation. (See R. 27 for statement of rule by Court of Criminal Appeals.)

This case comes within the doctrine recently announced (May 24, 1937) by the Supreme Court of the United States, in the case of HARTFORD STEAM BOILER INSPECTION & INSURANCE COMPANY, ET AL., v. HARRISON, INSURANCE COMMISSIONER, 57 Sup. Ct. Rep. 838, 301 U.S. 459, 462, 81 L. Ed. 1223, 1226), wherein the court said:

> "Despite the broad range of the State's discretion, it has a limit which must be maintained if the constitutional safeguard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture. Borden's Co. v. Baldwin, 293 U.S. 194, 209. They cannot stand as reasonable if they offend the plain standards of common sense. * * *
>
> "It is idle to elaborate the differences between mutual and stock companies. These are manifest and admitted. But the statutory discrimination has no reasonable relation to these differences."

This language of the Supreme Court of the United States is more strongly applicable to the facts in this case, if possible, than it was in the situation which was presented to the court in the case wherein this language was used. JUDGE CHRISTIAN, writing in this case for the Court of Criminal Appeals of Texas, points out that farmers and stockmen live in the country, that they have few opportunities and slight facilities for impairing competition and controlling prices, that supervening economic conditions since 1902 have brought poverty to this class of people and prosperity to others,—these are the differences, so JUDGE CHRISTIAN says, which justify this exemption.

We point out in the first place, that mere differences between classes are not sufficient to justify class discrimination. Of course, the Legislature of Texas can classify; but the classification must be reasonable, not arbitrary, and must rest

upon *some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similary circumstanced shall be treated alike.* Capricious and arbitrary classifications, having no reasonable relation to the object of the legislation, are illegal under the FOURTEENTH AMENDMENT. These rules are axiomatic. The difficulty arises when we come to apply them to concrete facts. We submit, however, that no difficulty should arise in this case, because: (1) the exact question has been decided by this Court in the CONNOLLY case, supra; and (2) it is clear that the alleged differences between the "included" and the "excluded" classes, pointed out in the opinion of the Court of Criminal Appeals (R. 11-33, incl.), are either fanciful conjectures or clearly have no reasonable relation to the object of this legislation. Many people carry on their business in the country besides farmers and stockmen. Many business men have as little opportunity to suppress competition as farmers and stockmen. Many people are as poor as farmers and stockmen. These alleged differences between the exempt and included classes, pointed out in the opinion of JUDGE CHRISTIAN, are not the kind and character of differences which justify discriminatory legislation at which the equality-provision of the FOURTEENTH AMENDMENT is aimed. When we see that farmers and stockmen are forbidden by the civil law to make price-fixing contracts, we cannot believe that the Legislature made this exemption from the penal law in order to improve the economic situation of farmers and stockmen; and the mere fact that more farmers and stockmen live in the country than live in the city, and the mere fact that they as a group may not have the same opportunities and facilities for impairing competition and controlling prices as some other classes of businessmen, are differences insufficient to justify the attempted classification, which obviously does not rest "upon any ground of difference having a fair and substantial relation to the object" of the criminal antitrust statutes.

Without further elaboration upon the proposition that the CONNOLLY case is decisive of the issue involved in this appeal, and that the principle of law therein announced, as applied to the facts herein, is sound and logical and should not be overruled by this Court, we simply refer the Court to a few of the leading cases which have followed the CONNOLLY case and applied to different sets of facts the principle of law therein announced: TRUAX v. CORRIGAN, 257 U.S. 312, 66 L. Ed. 254, 42 Sup. Ct. Rep. 124; POWER MANUFACTURING CO. v. SAUNDERS, 274 U.S. 490, 71 L. Ed. 1165, 47 Sup. Ct. Rep. 678; QUAKER CITY CAB CO. v. PENNSYLVANIA, 277 U.S. 389, 72 L. Ed. 927, 48 Sup. Ct. Rep. 553; LIGGETT CO. v. BALDRIDGE, 278 U.S. 105, 73 L. Ed. 204; SMITH v. CAHOON, 283 U.S. 553, 75 L. Ed. 1264; FROST v. CORPORATION COMMISSION, 278 U.S. 515, 73 L. Ed. 483; GULF, C. & S. F. RY. CO. v. ELLIS, 165 U.S. 150, 41 L. Ed. 666; IN RE OPINION OF JUSTICES, 211 Mass. 618.

Argument

II.

The opinion of the Court of Criminal Appeals of Texas (R. 29-32) contains an elaborate defense of the validity of coöperative marketing statutes. A straw man is thus set up to the end that it may be readily and surely demolished. We make no complaint in this case to the effect that *bona-fide coöperative* marketing statutes create such exceptions to State antitrust statutes as to bring such last named statutes within the condemnation of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. The authorization of *bona fide* coöperatives to handle the *marketing of agricultural products and livestock* is clearly not such class legislation as to come within the condemnation of Section 1 of the FOURTEENTH AMENDMENT. This is a vastly different thing

from that which the State of Texas has attempted in the enactment of Chapter 3, Title 19, PENAL CODE OF THE STATE OF TEXAS, 1925. Here, price-fixing agreements, declared by civil law to be illegal, are given immunity merely because they relate to cows and cotton and the like rather than to beer and buttons and the like; those who make such agreements with reference *to the former* are still good citizens, so far as the criminal laws of Texas are concerned; those who make such agreements with reference *to the latter* are criminals who may be required to serve ten years in the State penitentiary. State policy, as reflected by civil statutes, condemns both kinds of agreements, but the State criminal statutes gives an exemption to the politically powerful, our farmers and stockmen, and prescribe severe penalties for all others similarly circumstanced, except as to political potency. The Texas law goes even further:—Farmers and stockmen can fix the price of agricultural products and livestock while in their hands; if others, not farmers or stockmen, fix this price, under the same circumstances, they are criminals. Appellant is forbidden to do what farmers and stockmen can do with impunity. No comfort for the State can be secured, under these circumstances, from the cases referred to in the opinion of the Court of Criminal Appeals on pages 30 to 32, incl., of the Record. LIBERTY WAREHOUSE CO. v. BURLEY, T. G. M. ASSO., 276 U.S. 71, 72 L. Ed. 473, cannot be used as authority to support an attempted classification as fanciful as that disclosed by this record. THE CONNOLLY case has uniformly been held inapplicable to *bona fide* coöperative organizations. MR. JUSTICE MCREYNOLDS, who wrote the opinion for the Court in the LIBERTY WAREHOUSE COMPANY case (276 U.S. 71, 91), said:

> "Connolly v. Union Sewer Pipe Co., 184 U.S. 540, is much relied upon. But there the circumstances differed radically from those here presented; and always to de-

termine whether equal protection is denied there must be consideration of the peculiar facts. Connolly resisted judgment for the purchase price of pipe upon the ground that the Union Company, the vendor, belonged to a combination or trust forbidden by an Illinois statute. The statute defined a trust, made participation therein criminal, and directed that those who purchased articles from an offending member should not be held liable for the price. Section 9 declared—'The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser.' This court held that because of the exemption the Union Company was denied the equal protection of the law. It was forbidden to do what others could do with impunity. Here the situation is very different. The questioned statute undertakes to protect sanctioned contracts against any interference—no one could lawfully do what the Warehouse Company did."

The significant words in the LIBERTY WAREHOUSE COMPANY case, which is relied upon by the Court of Criminal Appeals of Texas (R. 31), are these (276 U.S. 97):

> "The question is whether restrictions of the statute have reasonable relation to a proper purpose."

To what *proper* purpose could the exemptions of Article 1642 relate when you bear in mind that it could not possibly be "intended to encourage agriculture," as mentioned by JUSTICE MCREYNOLDS in the LIBERTY WAREHOUSE COMPANY case, because the making of price-fixing contracts by farmers and stockmen is condemned by the civil statutes which provide civil penalties therefor. No reason in the world can be offered for the exemption except that the Legislature did not want the *criminal law* to operate equally upon all who are similarly circumstanced,—an illegal purpose under the provisions of the FOURTEENTH AMENDMENT which guarantees equal protection of the law and strikes down as invalid

those State laws which contain clear discriminations having no reasonable relation to the object of the statute.

The Court of Criminal Appeals of Texas, in its opinion which is shown on pages 11-33 of the Record, not only errs in trying to justify its holding by reference to coöperative marketing decisions, but it commits an equally fatal error by attempting to rest its decision upon certain tax cases, such as AMERICAN SUGAR REFINING CO. v. LOUISIANA, 179 U.S. 89, 45 L. Ed. 102; COX v. TEXAS, 202 U.S. 446, 50 L. Ed. 1099; and others of a like nature. MR. JUSTICE HOLMES delivered the opinion in the case of COX v. TEXAS, supra, and in the course of his opinion (202 U.S. at p. 450), said:

> "The main argument addressed to us was rested on the notion that the statutes discriminate unconstitutionally between two classes of persons in the State, naturally existing there, as in Connolly v. Union Sewer Pipe Co., 184 U.S. 540, there was a discrimination with regard to trusts in favor of producers and raisers of agricultural products and live stock. This argument seems to us a fallacy. Farmers and stock raisers are classes naturally existing in the community, carrying on distinct callings and not likely to be engaged in anything else. Hence, although farmers and stock raisers equally with others were prohibited from forming trusts for other purposes, to permit them to form trusts in their regular business was practically and in fact to discriminate between two classes and others. The case was discussed throughout on the footing of classification. But, so far as we know, there is no natural distinction of classes among liquor sellers—one class selling their own domestic wines alone, another selling all intoxicants except domestic wines. The statutes regulate the doing of certain things which presumably all liquor sellers would prefer to be free to do. Therefore, whatever other objections there may be to them they do not deny the equal protection of the laws by forbidding without justification to one what they permit to another class."

It appears, therefore, very clearly that MR. JUSTICE HOLMES recognized the distinction in the statement of facts discussed in COX v. TEXAS, supra, and the statement of facts which was discussed in the CONNOLLY case, supra. However, this Court has stated time and again that in tax cases, there is a broader power of classification than in some other exercises of legislation. The following was the language of the court in CITIZENS' TELEPHONE CO. v. FULLER, 229 U.S. 322, 329, 57 L. Ed. 1206, 1213:

> "It may therefore be said that in taxation, there is a broader power of classification than in some other exercises of legislation."

And in CORNELIUS BILLINGS, ET AL., v. ILLINOIS, 188 U.S. 97, 102, 47 L. Ed. 400, 403, this Court further said:

> "On the other hand, the taxing power of a State is one of its most extensive powers. It cannot be exercised upon persons grouped according to their complexion. It can be exercised if they are grouped according to their occupations. A State may regulate or suppress combination to restrict the sale of products. The power cannot be exercised to forbid combinations among those who buy products, and permit combinations among those who raise or grow products. [CONNOLLY v. UNION SEWER PIPE CO.] 184 U.S. 540, 46 L. Ed. 679, 22 Sup. Ct. Rep. 43. And yet, exercising its taxing power, it has been decided that a State may make that discrimination. [AMERICAN SUGAR REFINING CO. v. LOUISIANA] 179 U.S. 89." (Names of Authorities Supplied.)

It will be noted that in the case last cited, this Court directly recognized the difference between classification for taxation and classifications for other purposes, and expressly holds that the AMERICAN SUGAR REFINING COMPANY case, supra, relied upon by the Court of Criminal Appeals of Texas (R. 31), is not in conflict with CONNOLLY v. UNION SEWER

PIPE COMPANY, the authority upon which appellant in this case primarily relies.

The Court of Criminal Appeals of Texas, in support of its decision upholding the validity of the criminal antitrust statutes of Texas, refers to certain early decisions of the appellate courts sustaining civil statutes of Texas and Tennessee, containing exemptions substantially the same as those contained in the PENAL CODE OF TEXAS, 1925. These include such cases as ANHEUSER-BUSCH BREWING ASSOCIATION v. HOUCK, 27 S.W. 692; HOUCK v. BREWING ASSOCIATION, 88 Tex. 184; WATERS-PIERCE v. STATE, 44 S.W. 936; and STATE v. SCHLITZ BREWING COMPANY, 59 S.W. 1033 (Tenn.) (R. 17-18, 20). All of these cases were decided prior to the decision of the Supreme Court of the United States in the case of CONNOLLY v. UNION SEWER PIPE COMPANY, 184 U.S. 539, and were overruled by that decision, as was expressly recognized by the Supreme Court of the State of Texas in the case of STATE v. COMPRESS COMPANY, 95 Tex. 603 (R. 19). The only other cases of any importance cited by the Court of Criminal Appeals in Texas in support of its judgment are the cases of CARROLL v. GREENWICH INSURANCE COMPANY, 199 U.S. 401, 50 L. Ed. 246; PATSONE v. COMMONWEALTH OF PENNSYLVANIA, 232 U.S. 138, 58 L. Ed. 539; OZAN LUMBER COMPANY v. UNION COUNTY NATIONAL BANK, 207 U.S. 251, 52 L. Ed. 195; WELCH COMPANY v. NEW HAMPSHIRE, 306 U.S. 79, 83 L. Ed. 500; DOMINION HOTEL COMPANY v. ARIZONA, 249 U.S. 265, 63 L. Ed. 597; and a few other authorities which the court says (R. 24) are also instructive and which are cited without comment. None of these cases supports the conclusions of the court. None of them overrules, modifies or limits the doctrine announced in the CONNOLLY *case*. For example, in the case of CARROLL v. GREENWICH INSURANCE COMPANY, supra, this Court was considering the validity of an Iowa statute, whereby fire insurance companies were prohibited

from combining to fix insurance rates or commissions paid agents. JUDGE CHRISTIAN, who wrote this opinion, evidently overlooked the fact that the State of Iowa had a general anti-trust act, prohibiting combinations among any business engaged in domestic commerce; and hence, as the court pointed out, the law with reference to fire insurance companies was merely in furtherance of this general statute and did not create a discrimination, since all were prohibited from doing that which fire insurance companies, by a special statute, were prohibited from doing. In the CARROLL case, supra, one of the principal authorities cited is the case of OTIS v. PARKER, 187 U.S. 606, 47 L. Ed. 323. This last named case was decided on January 5, 1903, by practically the same court which decided the CONNOLLY case. The opinion was written by MR. JUSTICE HOLMES, who was appointed to the court on December 8, 1902, taking the place of HORACE GRAY, Associate Justice, who died September 15, 1902, and who did not participate in the decision of the CONNOLLY case. OTIS v. PARKER dealt with a provision in the California constitution which provided that "all contracts for the sales of shares of capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." MR. JUSTICE HOLMES, in writing the court's opinion holding that such a provision was not contrary to the first section of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, said (187 U.S. 610):

> "If stopping the purchase and sale of stocks on margin would stop the gambling which it was desired to prevent, it was proper for the people of California to go no further in what they forbade. The circumstances disclose a reasonable ground for the classification, and these distinguish the case from Connolly v. Union Sewer Pipe Company, 184 U.S. 540."

It will be thus observed that the doctrine proclaimed in the CARROLL case, and the others last mentioned as being those cases principally relied upon by the Court of Criminal Appeals of Texas, relates back to the case of OTIS v. PARKER, which expressly recognizes the sound principle of law announced in the CONNOLLY case. Certainly no one can contend that such cases overruled the decision of the Supreme Court of the United States in the CONNOLLY case. It is significant that MR. JUSTICE HOLMES in numerous opinions written by him,—from two of which we have already quoted,—recognized as sound the decision of this Court in the CONNOLLY case. We regard this as rather significant, because it would indeed be strange to see overruled a case which has the approval of practically all members of the court, over a period of four generations, insofar as such can be determined from the opinions which have discussed the case in the consideration of analogous factual situations. No judge of this Court, liberal or conservative, if popular classifications may be used, has seen fit to criticize, much less overrule, this decision, as the Court of Criminal Appeals of Texas has done.

The next case relied upon by the Court of Criminal Appeals is PATSONE v. COMMONWEALTH OF PENNSYLVANIA, supra (R 21), in which this Court sustained a statute of Pennsylvania, which made it unlawful "for any unnaturalized foreign born resident to kill any wild bird or animal except in defense of personal property, and to that end makes it unlawful for such foreign born person to own or be possessed of a shotgun or rifle; with a penalty of $25.00 and a forfeiture of the gun or guns." The opinion in this case was written by MR. JUSTICE HOLMES, who wrote the opinion in OTIS v. PARKER, upon which we have already commented. Counsel for Patsone did not cite, in his argument, the CONNOLLY case. The statute was manifestly designed to protect the State's natural resources from aliens, a power universally recognized (GEER v. CONNECTICUT, 161 U.S. 519, 40 L. Ed.

793), and the statute furthermore designated a particular class as defining those producing the evil, but from that class *none was exempted*. The rule announced in this case is merely that the State need not so broaden its classification as to cover "the whole field of possible abuses," the same principle mentioned in the case of OTIS v. PARKER, supra, wherein JUSTICE HOLMES expressly recognized the distinction between such a rule and that rule announced in the CONNOLLY case.

It is not deemed necessary to analyze all of the cases, above listed, as being those principally relied upon by the Court of Criminal Appeals, for it will be found in each instance that none of them militates against the principle of law announced in the CONNOLLY case. Most of them refer to the CONNOLLY case and distinguish it, as was done by MR. JUSTICE PECKHAM, who wrote the opinion for a unanimous court in the case of OZAN LUMBER COMPANY v. UNION COUNTY NATIONAL BANK OF LIBERTY, supra, strongly relied upon by the Court of Criminal Appeals of Texas (R. 21). MR. JUSTICE PECKHAM said (207 U.S. 257):

> "The case of Connolly v. Union Sewer Pipe Co., 184 U.S. 540, one of the cases cited by the circuit court, is not, in our opinion, applicable. The statute did not apply to agricultural products or livestock while in the hands of the producer or raiser. It was held that this exemption rendered the statute void, as denying to persons within the jurisdiction of the state the equal protection of the laws. The statute was held to create a classification of an arbitrary nature, applicable to large numbers of people, and yet not based upon any reasonable ground. Those who were exempted from its provisions were numerous and stood practically in the same relation to the subject matter of the statute as did the other class upon whom the statute acted, and no valid reason could be given why, if one were included, the other should be exempted. The same reasons applied to all the classes, and should have led to the same results with regard to all. There was no room for a proper or fair discrimination."

Without prolonging this brief with a detailed analysis of all of the cases relied upon by the Court of Criminal Appeals of Texas, in upholding this statute, it is sufficient to say that like those heretofore analyzed, they in no sense overrule the CONNOLLY case; and none of them can be remotely considered as authority for justifying the gross discrimination created by Article 1642 of the REVISED PENAL CODE, 1925.

In this opinion of the Court of Criminal Appeals (R. 30), JUDGE CHRISTIAN refers to the enactment by the several states of coöperative marketing acts. We do not challenge the right of the State to promote the welfare of the agricultural class by the enactment of *bona fide* coöperative marketing laws. JUDGE CHRISTIAN mentions the enactment by the Congress of the CLAYTON ACT, the CAPPER-VOLSTEAD ACT, and the CO-OPERATIVE MARKETING ACT of July 2, 1926 (R. 30), all being evidence of the urge for legislation to promote prosperity in agricultural pursuits. It is perhaps not amiss to point out that on December 4, 1939, in the case of UNITED STATES OF AMERICA v. THE BORDEN COMPANY, ET AL., 84 L. Ed. 143 (advance sheets), this Court held that the AGRICULTURAL ADJUSTMENT ACT, as reënacted and amended by the AGRICULTURAL MARKETING AGREEMENT ACT, affords no ground for construing the SHERMAN ACT as inapplicable to a price-fixing conspiracy. The arm of the SHERMAN LAW was strong enough to reach price-fixers who sought to justify their activities by authorization contained in the CLAYTON ACT, the CAPPER-VOLSTEAD ACT, the AGRICULTURAL ADJUSTMENT ACT OF 1933, as amended in 1935 and as reënacted and amended by the AGRICULTURAL MARKETING AGREEMENT OF 1937. The evidenced desire of the Legislature or the Congress to help and assist farmers and stockmen cannot be used as a reason to justify gross discriminations in Texas Penal Statutes.

It is not believed that counsel for the State in this case can justify the reasoning of JUDGE CHRISTIAN in his opinion, when he says that (132 S.W. (2d) 897):

> "The Legislature, in making the classification, was entitled to consider prevailing economic conditions and the differences between the classes in their relation to the ultimate object of the statute, which was the promotion of the general prosperity" (R. 32).

The primary and fundamental reason why this exemption cannot be justified on any such basis is that from any conceivable viewpoint, the exemption in Article 1642 could not possibly have this result, because the civil antitrust statutes made the price-fixing agreements of farmers and stockmen illegal, and provided appropriate civil penalties for the making of such agreements; and therefore, under such conditions, the exemption of this class from the operation and effect of the criminal antitrust statutes could not be justified on the grounds that such was in aid of State policy, when State policy, as declared by the civil statutes of Texas, condemned such contracts as were exempted by Article 1642 from the operative effect of the Texas criminal antitrust statutes.

JUDGE CHRISTIAN concludes the opinion by saying (132 S.W. (2d) 897):

> "In the difference of these situations, and in other differences which will occur to any reflection, might not the Legislature see difference in opportunities and powers between the classes in regard to the prohibited acts? That differences exist cannot be denied. To describe and contrast them might be invidious" (R. 33).

We certainly deny these statements and say in reply thereto *that no reasonable person could possibly conceive of any substantial differences, having any reasonable relation to the object of this legislation*, between the classes excluded by Article 1642 and the other classes coming within the condemnation of Articles 1632, 1633, 1634, 1635 and 1637 of Chapter 3, Title 19, of the PENAL CODE OF THE STATE OF TEXAS, 1925. There might be some possible justification for this statement if

the policy of the State of Texas were to exempt from all anti-trust legislation the business of farmers and stockmen, such being done on the theory that it would promote the general welfare and prosperity of this particular class. Counsel for appellant seriously doubts the right of the State of Texas to do this. This Court declared, in the CONNOLLY case, that it could not be done in Illinois. Here the State of Texas undertakes to go further with its discrimination than did the State of Illinois. Certainly the equal protection clause of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES is violated when all price-fixing is made a felony except price-fixing with reference to agricultural products or livestock while in the hands of the producer or raiser, particularly when at the same time the criminal law grants this exemption, the civil antitrust statutes of the same State make such contracts illegal and provide for large penalties to be assessed against those who engage in price-fixing activities with respect to these commodities, even though they still be in the hands of the producer or raiser. STATE OF TEXAS v. STANDARD OIL COMPANY, 130 Tex. 313, 107 S.W. (2d) 550. Clearly the exemption, under these circumstances, cannot even remotely tend to promote the economic welfare of either the stockman or the farmer. The State of Texas, by its laws, has created a more glaring discrimination than that which was presented in the factual situation discussed in the CONNOLLY case.

We submit that the facts in this case bring appellant within the rule unanimously approved by this Court in the case of SMITH v. CAHOON, 283 U.S. 553, 567, wherein the court, speaking through CHIEF JUSTICE HUGHES, said:

> "'Such a classification is not based on anything, having relation to the purpose for which it is made.' Air-Way Electric Corp. v. Day, 266 U.S. 71, 85; Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 563, 564; Southern Ry. Co. v. Greene, 216 U.S. 400, 417; Truax v. Cor-

rigan, 257 U.S. 312, 332, 333; Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 37."

In this case a distinction was sought to be made between those who carry for hire farm products and those who carry for hire bread or sugar or other useful commodities. Unanimously the court declared the classification to be purely arbitrary. The gross discrimination in the case now before this Court is even more glaring than that declared illegal in the foregoing case.

Argument

III.

There seems to be no very material difference between JUDGE CHRISTIAN, writing for the Court of Criminal Appeals of Texas and counsel for the appellant in their understanding as to the rules of law applicable to the right of classification under the provisions of Section 1 of the FOURTEENTH AMENDMENT. Counsel for appellant do not take issue with the general rules laid down by the Supreme Court in LINDSLEY V. NATURAL CARBONIC GAS COMPANY, 220 U.S. 61, 55 L. Ed. 369, or the other authorities listed in the opinion of the Court of Criminal Appeals, as shown on page 27 of the Record. The rule of law is quite clear. It is the application of the rule which creates our disagreement. All agree that the State's power to classify is limited under the provisions of Section 1 of the FOURTEENTH AMENDMENT to the extent that the classification must be on some reasonable basis and not purely arbitrary, and that the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. Can it be said that appellant is accorded "the equal protection" of the criminal laws of Texas, when it appears that he may be sent

to the penitentiary of Texas for ten years for an alleged conspiracy to fix the price of beer, when at the same time it is unlawful for a ranchman in Harris County, Texas, to fix the price of livestock, when in his possession, but nevertheless such ranchman is not subject to the aforesaid criminal statute for no other reason, it appears, than because of the fortuitous circumstance that he is a ranchman and not engaged in some other business? Are classifications reasonable when the only ground of difference between the "included class" and the "excluded class" is that they pursue different occupations? Whoever gives an affirmative answer to this inquiry must wholly disregard that part of the well recognized rule of classsification, that the classification must rest upon some ground of difference, HAVING A FAIR AND SUBSTANTIAL RELATION TO THE OBJECT OF THE LEGISLATION. If price-fixing is detrimental to the public, and if all price-fixing agreements are illegal, then what difference does it make whether the price-fixer is a farmer or a druggist? This difference has no fair and substantial relation to the object of the law, to wit, preventing price-fixing; and hence a classification based thereon is illegal under the provisions of the first section of the FOURTEENTH AMENDMENT. It seems to counsel for appellant that this proposition is so clear and obvious as to hardly merit serious discussion; and counsel cannot believe that this Court will sanction the legislation of a State which is made to apply to particular classes on any such basis of differentiation as that which appears beyond dispute in this case.

The following additional authorities are cited to show how attempted classifications, less arbitrary than that made by the laws of the State of Texas in this case, were attempted but were not permitted by this Honorable Court, because they were a violation of Section 1 of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: HARTFORD INSURANCE CO. v. HARRISON, 301 U.S. 459, 57 Sup. Ct. Rep. 838; SMITH v. CAHOON, 283 U.S. 553, 75 L. Ed. 1264;

TRUAX v. CORRIGAN, 257 U.S. 312, 66 L. Ed. 254, 27 A.L.R. 375; FROST v. CORPORATION COMMISSION, 278 U.S. 515, 73 L. Ed. 483; TRUAX v. RAICH, 239 U.S. 33, 60 L. Ed. 131; POWER MANUFACTURING CO. v. SAUNDERS, 274 U.S. 490, 71 L. Ed. 1165; COTTING v. GODARD, 183 U.S. 79, 46 L. Ed. 92; GULF, C. & S. F. RY. CO. v. ELLIS, 165 U.S. 150, 41 L. Ed. 666, 17 Sup. Ct. Rep. 255; YICK WO v. HOPKINS, 118 U.S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064; MISSOURI v. LEWIS, 101 U.S. 22, 25 L. Ed. 989; DUNCAN v. MISSOURI, 152 U.S. 377, 38 L. Ed. 485, 14 Sup. Ct. Rep. 570.

Conclusion

The Constitution of the State of Texas contains in Article One a Bill of Rights in which it is provided that "all freemen, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." The decision of the Court of Criminal Appeals of Texas in this case has made a mockery of this provision in the Bill of Rights of the Texas Constitution. An humble citizen of Texas, protecting himself through the means of a writ of habeas corpus, as authorized by Section Twelve of this Bill of Rights, has exhausted every opportunity and made every possible effort to secure his liberty through the courts of his State. This prayer for relief has been denied by the court of last resort in Texas. He comes now to this tribunal to invoke its protection in one of the great rights which he enjoys as a citizen of the United States,—a right guaranteed by the first section of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." He claims this right as a citizen of the United States, but it is a valuable right which is extended to every person within the jurisdiction of a State, irrespec-

tive of his citizenship. Appellant feels that, under the conditions reflected by this record, he is not accorded the equal protection of the laws of the State of Texas, and that the Court of Criminal Appeals of Texas, in its opinion, has merely rendered lip service to this important constitutional guarantee. Clearly, he feels, the State of Texas, contrary to the Bill of Rights in the STATE CONSTITUTION, and contrary to the provisions of Section 1 of the FOURTEENTH AMENDMENT TO THE UNITED STATES' CONSTITUTION, is extending to a class of its citizens special privileges which are denied to appellant. Stockmen and farmers of Texas, who make illegal price-fixing contracts with reference to agricultural products and livestock while in their hands, are exempt from prosecution under the criminal laws of the State of Texas, because of the provisions of Article 1642 of the PENAL CODE. The alleged price-fixing conspiracy of this appellant is made illegal by the laws of the State of Texas; but appellant, unlike his fellow citizens who belong to the excepted class of farmers and stockmen, can be sent to the penitentiary of Texas for a period of ten years, because he participates in the making of an illegal agreement. Appellant feels that it is clearly obvious that this is not the equality of law which the decisions of this high tribunal guarantee. This is class legislation which bears all of the earmarks of favoritism and unwarranted discrimination. The equal protection clause of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES becomes a meaningless jargon of words, if it be not effective to correct a condition under which appellant can be made to serve ten years of his life in the State penitentiary for doing that for which his neighbor, who does the identically same thing, cannot be called to account under the criminal laws of his State, because appellant does not happen to follow the vocation pursued by his neighbor, which is the only real difference upon which the State, defending this exemption, bases

a claim of reasonable classification within the meaning of the first section of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

WHEREFORE, premises considered, appellant prays that the judgment of the Court of Criminal Appeals of Texas be reversed, and that this Honorable Court enter an order directing the said Court of Criminal Appeals of Texas to set aside the judgment of the Criminal District Court No. 2 of Harris County, Texas, remanding appellant to the custody of Norfleet Hill, Sheriff of Harris County, Texas, and further directing said court to enter an order discharging the said appellant from the custody of said officer, as prayed for by appellant in his original application for a writ of habeas corpus in Cause No. 49,974 on the docket of the Criminal District Court No. 2 of Harris County, Texas.

Respectfully submitted,

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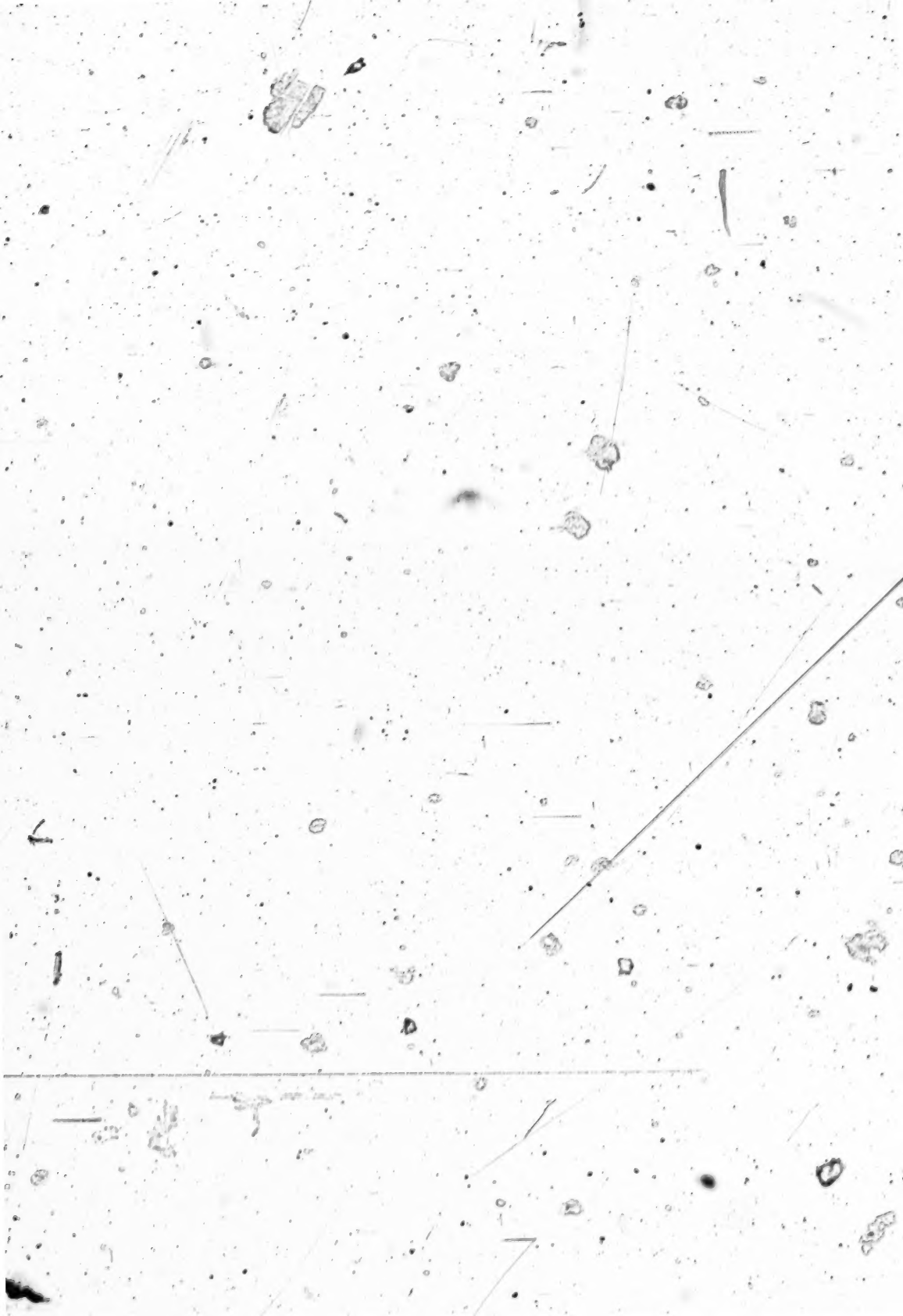

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No. 635

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

HERBERT TIGNER,
Appellant,

vs.

THE STATE OF TEXAS

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

BRIEF FOR THE STATE OF TEXAS

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FIRM FOUNDATION—AUSTIN

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BRIEF FOR THE STATE OF TEXAS

PRELIMINARY STATEMENT

The appellant, Herbert Tigner, together with Fred H. Tinch, C. H. Valentine and J. Earl Hogue were charged by indictment in Harris County, Texas, of violating the anti-trust laws of the State of Texas, they being charged with having entered into a conspiracy to fix the retail price of beer (R 1).

Appellant sued out a writ of habeas corpus before the district judge in Harris County, Texas, asking that he be discharged from custody on the sole ground that the indictment was void because the penal anti-trust statutes of the State of Texas (being Articles 1632 to 1644 inclusive of said penal code) on which the indictment was predicated violated the "due pro-

cess" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the State of Texas, because Article 1642 thereof provides:

> "No provision of this law shall apply to agricultural products or live stock while in the hands of the producer or raiser * * *" (R 4-5).

The trial court refused to discharge appellant but remanded him to the custody of the sheriff (R 10-11).

The Court of Criminal Appeals of Texas, being the court of last resort in criminal matters in Texas, affirmed the judgment of the trial court and remanded appellant to the sheriff (R 33).

The anti-trust statutes of Texas as contained in the Penal Code of Texas are set out in their entirety in the opinion rendered by the Court of Criminal Appeals of Texas, being Articles 1632 to 1644, incl., of the Penal Code (R 12-17).

The opinion of the Court of Criminal Appeals appears in the record (R 11-35) and is reported as ex parte Tigner, 132 S. W. (2d) 885.

The only question presented to this court is whether the entire penal anti-trust law of Texas is unconstitutional and therefore void because of the provision contained in Article 1642 of said Act, which reads:

"No provision of this law shall apply to agricultural products or live stock in the hands of the producer or raiser."

Said Article makes further exceptions but none of those are presented to this court for review.

Putting the question in a different way, are agricultural products and livestock in the hands of the producer or raiser a reasonable or a rational classification which the Legislature of Texas could exempt from the provisions of the criminal feature of the anti-trust law.

The State of Texas presents the following counter proposition to those made by appellant.

FIRST COUNTER PROPOSITION

The classification provided in the anti-trust statutes of Texas under review, namely: "No provision of this law shall apply to agricultural products or livestock in the hands of the producer or raiser" is based upon a reasonable classification and same does not offend against the "due process" and "equal protection" of Section 14 of the Fourteenth Amendment to the Federal Constitution.

SECOND COUNTER PROPOSITION

The exemption provided in Article 1642 of the Penal Code of Texas applies alike to all persons and

to all agricultural products or livestock while in the hands of the producer or raiser, and there is no unreasonable discrimination against any person because agricultural products and livestock while in the hands of the original producer or raiser is a distinct classification and one which, under the rules of construction, the Legislature of Texas was authorized and empowered to make.

ARGUMENT AND AUTHORITIES ON THE QUESTION RAISED

In determining whether a legislative act of a state which exempts any named class from its provision is constitutional, the Supreme Court in *Lindsley* v. *Natural Carbonic Co.*, 220 U. S. 61, in upholding a statute of New York which made it unlawful to pump or otherwise draw mineral water from a well made by boring and/or drilling into the rock but which statute did not apply to mineral water taken from wells drilled without going into the rock laid down, we think, two fundamental rules, namely:

1. The construction given to a statute by the highest court of the state where the law was passed should be given great weight by the Supreme Court.

2. If the classification made by the legislature is reasonable and/or rational on any theory same should be and will be upheld by the court because such exemption would be a policy to be determined by the

legislature and not by the courts and in so doing the court used this language:

"Coming to the provision in question, it is necessary to inquire what construction has been placed upon it by the highest court of the state, for that construction must be accepted by the courts of the United States, and be regarded by them as a part of the provision when they are called upon to determine whether it violates any right secured by the Federal Constitution. Weightman v. Clark, 103 U. S. 256; Morley v. Lake Shore and M. S. R. Co., 146 U. S. 162; Olsen v. Smith, 195 U. S. 333. * * *

"Because the statute is directed against pumping from wells bored or drilled into the rock, but not against pumping from wells not penetrating the rock, and because it is directed against pumping for the purpose of collecting the gas and vending it apart from the waters, but not against pumping for other purposes, the contention is made that it is arbitrary in its classification, and consequently denies the equal protection of the law to those whom it affects.

"The rules by which this contention must be tested, as is shown by repeated decisions of this court are these: 1. The equal-protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause

merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Bachtel v. Wilson, 204 U. S. 36; Louisville and N. R. Co. v. Melton, 218 U. S. 36; Ozan Lumber Co. v. Union County National Bank, 207 U. S. 251; Munn v. Illinois 94 U. S. 113; Henderson Bridge Co. v. Henderson, 173 U. S. 592; * * *

"In conclusion upon this point, it suffices to say that the case as presented, instead of plainly disclosing that the classification is arbitrary, tends to produce the belief that it rests upon a reasonable basis."

With the above principles laid down as a guide for the determination of the validity or constitutionality of the statutes of the respective states, we desire to first call the court's attention to the construction placed on the statute in question by the Court of Criminal Appeals in the case at bar, being fully stated in ex parte Tigner, 132 S. W. (2) 885, the court used this language:

"The first anti-trust statute (of Texas) was enacted in 1889. It embraced a provision exempting from its operation agricultural products or livestock while in the hands of the pro-

ducer or raiser. The same exemption was made a part of the Anti-Trust Act of 1895 which also carried an exemption in favor of laborers, organized for the purpose of maintaining a 'standard of service.' In 1894 the Anti-Trust Act of 1889 came before the Court of Civil Appeals of the 4th Supreme Judicial District of the State in the case of Anheuser-Busch Brewing Ass'n. v. Houck, 27 S. W. 692. In sustaining the exemption relating to agricultural products and livestock, the court said: 'It is apparent that all persons, of every class, upon whom the act professes to operate, are treated without distinction. This feature of a general statute is held to be the test whether it is or not obnoxious to that objection, and we believe the act to be valid.' When the case was considered by the Supreme Court of Texas the classification was again sustained, the court saying: 'For the reasons given by the Court of Civil Appeals, we also agree with them in holding that the Act is not in violation of the constitution' Houck v. Brewing Association, 88 Tex. 184. In 1898 the Anti-Trust Act of 1895 was considered by the Court of Civil Appeals of the Third Supreme Judicial District of the state in the case of Waters-Pierce Oil Company v. State, 44 S. W. 936. In overruling the contention that the classification was repugnant to the equal protection clause of the Fourteenth Amendment, the court said: 'The domestic welfare of the people of this state is within the keeping of its legislatures, and they are supposed to best know their wants and necessities and the policy that shall govern its internal affairs, and the remedies needful in the pursuit of this policy, and that are necessary in order to extinguish or prevent evil and harmful conditions, affecting the general

interest and the public welfare. These are matters political, and relate to the economic affairs of government, and are peculiarly within the knowledge of the law making department thereof. The remedies therefore, lie within the legislative province and are to some extent, confided to their discretion and wisdom * * *

"In pursuit of this policy, conditions might exist which would justify the legislature in creating and providing remedies adequate to suppress the evil, when applied to one class of subjects, which might not, in their opinion, be necessary to be applied to other classes: for the danger to the public welfare from the pursuit of evil by the one class may be of such magnitude, and lead to such disastrous consequences, that corrective measures are absolutely essential to the order of good government, and to the repose and stability of society, while, upon the other hand, the danger in these respects from the excluded classes may be inappreciable under acts denounced so difficult of confirmation at their hands, in injurious effects upon the welfare of the people, that corrective measures are not necessary to be applied to them. Now, combinations and trusts in restraint of trade, and the existence of monopolies which place it within the power of those combining to affect and elevate the prices of commodities in use by the peoples of the world under their enjoyment and necessities are harmful to the welfare of the public, whenever and wherever such conditions are permitted to exist. With the knowledge of this fact within the mind of the lawmakers, the legislature of this state, in the later history and with knowledge of current events, may, with much reason, have concluded that the dan-

ger from trusts and combinations, which in their operation would injuriously affect the people, would be at the hand of the buyer and seller and dealer in commodities, and not at the hands of the producers, and that by reason of the generally admitted necessity of the producers to readily and speedily dispose of their products, and the difficulties in their way to a successful combination, relating to the disposition of their products, little, if any, danger to the public could be apprehended from that source. The legislatures of the state are supposed to have acted in this matter intelligently, and with the knowledge of the conditions and dangers confronting the people from the combinations and trusts: and it requires little enlightenment to discover that at the time these laws were passed, and now, the disturbing classes which were and now are so injuriously affecting the public welfare, are the buyers, sellers, and dealers in the articles in use by the people of this state. The unbridled license of these classes, which in many instances was exercised, had within this state, as well as other sections of the country, assumed such proportions that the danger to the welfare of the people was so apparent that the laymen as well as the lawgiver could discern.'

"The Supreme Court of the state denied the application of the oil company for a writ of error thereby sustaining the validity of the statute. In the case of State v. Compress Company, 95 Tex. 603, the Supreme Court of the state in giving effect to the decision in the Connally case held the anti-trust statute of 1895 to be in conflict with the Fourteenth Amendment. In the course of the opinion the court said: 'The defendant insists that the law

is unconstitutional, therefore void in whole, and will not support the action to forfeit the charter. Upon the same objection we held the Anti-Trust Law of 1889 to be constitutional, and there is no such difference between the two laws as would affect the decision of this question. We believe that our decision is correct: that the law is not in contravention of the constitution of the state nor of the United States. Houck v. Brewing Ass'n., 88 Tex. 189. In the case of Connally v. The Union Sewer and Pipe Line Co., 184 U. S. 539, 22 Sup. Ct. R 437, the Supreme Court of the United States held that a statute of the State of Illinois in all essential particulars the same as the act of 1895, was in conflict with the Fourteenth Amendment to the Constitution of the United States because it excepted 'agricultural products and livestock while in the hands of the producer or raiser.' We recognize the superior authority of the Supreme Court of the United States on this question and in obedience to its decision we shall hold that in so far as the law of 1895 comes within the terms of the Connally case it is invalid * * *"

In this connection we think it proper to call the court's attention to the fact that the tendency of recent state and federal laws is towards a more liberal releasing of agricultural associations, created under the various laws of the states, and especially as demonstrated under the Cooperative Marketing Acts of the various states, from the rigors of anti-trust laws. See Cooperative Marketing Act of Texas, Article 5737-5764, Revised Civil Statutes of Texas; 9 Tex. Jur. pp. 558-564; The Clayton Act passed by Congress October 15, 1914, Sec. 6, c. 323,

38 Stat. 730, U. S. C. A. Tit. 15, Sec. 17; The Capper-Volstead Act passed by Congress February 18, 1922, c. 57, 42 Stat. 388 U. S. C. A. Tit. 7, § 291 and 292; the Cooperative Marketing Act passed by Congress July 2, 1926, c. 725, 44 Stat. 802 U. S. C. A. Tit. 7. Sec. 451-457 and Tit. 12, § 1141; The Lever Act passed in 1918; 41 Corpus Juris p. 167; 6 Ruling Case Law p. 411; 8 Thompson on Corporations (3rd Ed.), sec. 6770, et seq.

RECENT ACTS PASSED BY CONGRESS

In September 1922 Congress passed what is known as the "Commodity Exchange Act" and amended same in June, 1936, ch. 369, § 1, 42 Stat. 998, U. S. C. A. 7, Sec. 1, p. 5. By Section 6 of said Act it was made unlawful for persons to deal in "commodity futures." By Section 6a, subdivision (3) and subsection thereunder (a) there was exempted from the provisions of said Act, "the amount of such commodity such person is raising, or in good faith intends or expects to raise, within the next twelve months, on land which such person owns or leases, U. S. C. A. 7, p. 15. This Act clearly exempts from its provisions farm products raised or to be raised during the current farm year. This Act of Congress was upheld in *Board of Trade of Kansas City* v. *Milligan*, 90 Fed. (2d) 895 in which a writ of certiorari was denied by the Supreme Court, 302 U. S. 710.

On August 15, 1921, Congress passed what is

known as the "Packers and Stockyards Act," U. S. C. A. 7, p. 91, c. 64, § 1, 42 Stat. 159. By Section 191 of said Act, the term "packer" is defined and by Section 182 of said Act the term "commerce" is defined. Under the definitions of the word "packer" and "commerce" the farmers who are the producers are as a class excluded. By Section 192 of the "Packers and Stockyards Act" it is made unlawful for any packer "to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce." This Act recognizes as reasonable the classification of farmers and farm products.

By Section 218b of the "Packers and Stockyards Act" the term "live poultry dealer" is defined as being "a person engaged in the business of buying or selling live poultry in commerce" and by referring to the definition of the word "commerce" as given in Section 182 of said Act it is easily discernable that the producer of live poultry is not embraced therein (U. S. C. A. 7, p. 130).

In May, 1933, Congress passed the Agricultural Adjustment Act, which was amended on June 3, 1937. C. 296, § 1, 2 (a), 50 Stat. 246, Section 601 of said Act, 7 U. S. C. A. p. 261 states:

> "It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit

structure and that these conditions affect transactions in agricultural commodities with the natural public interest, and burden and obstruct the normal channels of interstate commerce."

By Section 602 of such Agricultural Adjustment Act, 7 U. S. C. A. p. 263 the Secretary of Agriculture is authorized to establish and maintain "marketing conditions for agricultural commodities in interstate commerce as well as establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities."

By Section 608-b of the Agricultural Adjustment Act, 7 U. S. C. A. p. 284, it is provided "in order to effectuate the declared policy of this chapter, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the anti-trust laws of the United States, and any such agreement shall be deemed to be lawful."

By Section 671 of the Agricultural Marketing

Act, U. S. C. A. 7, p. 369, it is provided that the Secretary of Agriculture shall have the right to arbitrate the questions that may arise with the Co-operative Association and other organizations for the sale of silk or its products as provided by the Agricultural Market Agreement Act and subdivision (d) of said Section 671, provides:

> "No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the anti-trust laws of the United States."

In the Commerce and Trade Act, 15 U. S. C. A. p. 210, Title 15, passed by Congress in October, 1914, Sec. 17, thereof reads:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws."

The Lever Act, passed by Congress to prevent the hoarding of food, exempts from its provisions farmers or stockmen, with respect to farm products

raised or produced by them on land owned or rented by them, and the Act was upheld as being a reasonable classification in *Weed* v. *Lockwood*, 266 Fed. 785.

The Internal Revenue Act, passed by Congress in 1934, Title 26, Section 103 (12), 26 U. S. C. A., page 433, exempted from said Act, "farmers, fruit-growers, or like associations organized and operated on a cooperative basis (a) for the purpose of marketing the products of members or other producers, and turning back to them the proceeds of sales, less the necessary marketing expenses."

The Bankhead-Jones Farm Tenant Act, passed by Congress July 22, 1937, Chapter 517, 50 Statutes 522, authorizes the Secretary of Agriculture to make loans under certain conditions. Section (b) of said Act provides:

> "Only farm tenants, farm laborers, sharecroppers, and other individuals who obtain, or who recently obtained, the major portion of their income from farming operations shall be eligible to receive the benefits of sections 1001 to 1006 of this title, * * *"

The Capper-Volstead Act, passed by Congress in 1922, 7 U. S. C. A. p. 151, Title 7, Chapter 12, Section 291 and 292, authorized farmers as a class to act together in processing and marketing their products.

The Social Security Act passed by Congress ex-

cludes from its provisions agricultural labor, Title 42, Section 409, U. S. C. A.

The Rural Electrification Act, passed by Congress is 1936; see Agricultural Title 7, Section 901, U. S. C. A. p. 878, specifically provides aid to farmers and rural communities in securing the benefiit of electricity.

The Emergency Farm Mortgage Act, passed by Congress in 1933, authorized loans to farmers as a class to prevent foreclosure on their farms.

TEXAS EXEMPTIONS

In 1925 the State of Texas, by Article 7065a (13), exempted farmers from the payment of the gasoline tax.

By Article 6675a (6a) the Legislature of Texas, in 1934, granted to farmers as such a reduction of 50% on license fees required to be paid for their trucks.

Article 8, Section 19 of the Constitution of Texas exempts from taxation all farm products in the hands of the producer.

Article 827a, Section 3 of the Penal Code of Texas, prescribes the width, length, and height of motor vehicles but exempts from said law, among others: "implements of husbandry." This statute was up-

held in *Sproles* v. *Binford*, 52 Fed. (2) 730 Aff. 59 S. Ct. 581.

In *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, the Supreme Court upheld the constitutionality of the Agricultural Marketing Agreement Act passed in 1937 by Congress. Said suit involved the legality of the milk prices and regulations fixed by the Secretary of Agriculture for the sale of milk in the State of New York. The court stated:

"(10) Uniform Price. The Jetter Dairy Company, a proprietary handler, urges that as milk cooperatives need not pay producers a uniform price, it is unreasonable, discriminatory and violative of the due process clause of the Fifth Amendment to require it to pay this uniform price. In Section 8c (5) (f) there is a definition of the type of cooperative permitted to settle with its members in accordance with membership contract. The general characteristics of cooperatives are well understood. The Capper-Volstead Act defines such cooperatives as associations of producers, cooperate or otherwise, with or without capital stock, marketing their products for the mutual benefit of the members as producers with equal voting privileges, restricted dividends on capital employed and dealing limited to 50% non-member products. Different treatment has been accorded marketing cooperatives by state and federal legislation alike. (The Clayton Act, Section 6, 38 Stat. 15 U. S. C. A. Section 17; Robinson-Patman Act, Sec. 4, 49 Stat. 1526, 15 U. S. C, A. Section 13b, Capper-Volstead Act, 42 Stat.

388, 7 U. S. C. A. Sec. 291, War Finance Corporation Act, 40 Stat., 506, as amended, 42 Stat. 181, 182. The Grain Futures Act, 42 Stat. 1000, 7 U. S. C. A. Section 7; The Agricultural Marketing Act, 46 Stat. 11, 12 U. S. C. A. Sec. 1141.) Indeed the secretary is charged by this Act to 'accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distrbiution.' These agricultural cooperatives are the means by which farmers and stockmen enter into the processing and distribution of their crops and livestock. In distinction between such cooperatives and business organizations have repeatedly been held to justify different treatment. (Flint v. Stone Tracy Co., 222 U. S. 107; Brushbaber v. Union Pacific Railroad Co., 240 U. S. 1; Chicago Board of Trade v. Olsen, 262 U. S. 1; Liberty Warehouse Co. v. Burley Tobacco Growers' Cooperative Association, 276 U. S. 71; Tobacco Growers' Association v. Jones, 185 N. C. 265; Kansas Wheat Growers v. Schulte, 113 Kan. 672; Brown v. Staple Cotton Growers' Coop. Ass'n., 132 Miss. 859; Northern Wisconsin Coop. Tobacco Pool v. Bekkedal, 182 Wis. 571; Dark Tobacco Growers' Association v. Dunn, 150 Tenn. 614; Minn. Wheat Growers v. Huggins, 162 Minn. 471; List v. Stearly Tobacco Growers' Coop. Ass'n., 114 Ohio State, 361; Dark Tobacco Growers' Cooperative Ass'n. v. Robinson, 84 Ind. App. 51; Potter v. Dark Tobacco Growers' Coop., 201 Ky. 441; Harrell v. Cane Growers' Coop., 160 Ga. 30; Nebraska Wheat Growers v. Norquest, 113 Neb. 731;

Warren v. Alabama Farm Bureau Cotton Ass'n., 213 Ala. 61. Manchester Dairy System v. Hayward, 82 N. H. 192; Clear Lake Cooperative Livestock Shippers Association v. Weir, 200 Iowa 1293; Hollingsworth v. Texas Hay Ass'n., 246 S. W. 1068; Washington Cranberry Ass'n. v. Moore, 117 Wash. 430; Poultry Producers v. Barlow, 189 Cal. 278; Oregon Growers' Cooperative Ass'n. v. Lentz, 107 Ore. 561; South Carolina Cotton Growers v. English, 135 S. C. 19; Milk Producers Marketing Co. v. Bell, 234 Ill. App. 222; Barnes v. Dairymen's Coop. Ass'n., Inc., 222 N. Y. Supp. 294 * * *

"(23, 24). Delegation to the Secretary of Agriculture. The purpose of the act is to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period.' To accomplish this, the Secretary of Agriculture is directed to issue orders whenever he has reason to believe the issuance of an order will tend to effectuate the declared policy of the act."

In *Cox* v. *State of Texas*, 202 U. S. 466, the Supreme Court, in 1906, held constitutional an act of the Texas Legislature, being Articles 5060-a to 5060-s, inclusive, of the Revised Civil Statutes, 1895, regulating the sale of liquors, which Act required the execution of a bond, and many other very strict regulations to be complied with, by those

who sold intoxicating liquors in Texas, although said Act provided:

> "The provisions of this chapter shall not apply to wines produced from grapes grown in this state while the same is in the hands of the producers or manufacturers thereof."

The Supreme Court held that said exemption did not destroy the act or cause same to be unconstitutional and stated that the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, which had been delivered by the Supreme Court some four years prior thereto, would and did not control the decision in the Cox case.

In *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285, rendered in 1935, the Supreme Court upheld a statute passed by the State of Georgia known as the "Motor Carrier Act of 1931." Said statute prescribed a system of regulation for private carriers for hire. There was exempted from said statute "motor vehicles engaged exclusively in the transportation of agricultural and/or dairy products between any of the following points; farm, market, gin, warehouse, or mill, where the weight of the load does not exceed 10,000 pounds, whether such motor-vehicle is owned by the owner or producer of said agricultural or dairy products or not, so long as the title remains in the producer." In upholding the constitutionality of said act, the Supreme Court stated:

"Another exception, and one that more than any other has drawn the appellant's fire, is for the benefit of motor vehicles engaged exclusively in the transportation of agricultural or dairy products, whether the 'vehicle is owned by the owner or producer of such agricultural or dairy products or not, so long as the title remains in the producer.'

"The Supreme Court of Georgia, construing that provision in this case, has said that the final clause 'so long as title remains in the producer' qualifies the entire exception, as indeed it obviously does.

"The (Georgia) court took notice of a common opinion 'well justified by the facts' that the farm land of the state had been 'accustomed to bear undue proportion of the taxes.' The effect of the exception would be to equalize the burden. * * *

"We think the classification thus designed to ameliorate the lot of the producers of farm and dairy products is not an arbitrary preference within the meaning and condemnation of the Fourteenth Amendment. The plight of the Georgia farmer has been pictured by the state court in words already quoted. To free him of fresh burdens might seem to a wise statecraft to be a means whereby to foster agriculture and promote the common good."

In *Nebbia* v. *People of the State of New York*, 291 U. S. 502, the Supreme Court upheld an act of the legislature of that state, passed in 1933, which authorized a milk control board to regulate or fix

the minimum retail price to be charged by stores to consumers for consumption of milk off of the premises where same was sold. The board fixed nine cents as the price to be charged by a store for a quart of milk. The contention was made that said order contravened the equal protection clause and the due process clause of the Fourteenth Amendment to the United States Constitution. In its opinion the court stated:

> "In the light of the facts the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livlihood, and the community for an assured supply of milk * * *
>
> "If the laws passed are seen to have a reasonable relationship to a proper legislative purpose, and are neither arbitrary or discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade or commerce is an economic question which this court need not consider nor determine,' Northern Securities Co. v. United States, 193 U. S. 197, * * *
>
> "Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be

annulled unless palpably in excess of legislative power."

In *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Cooperative Marketing Assn.*, 276 U. S. 71, the Supreme Court, in an opinion read by Mr. Justice McReynolds upheld an act of the State of Kentucky which authorized the incorporation of non profit cooperative associations for the orderly marketing of agricultural products which provided that only producers may become members and that the corporation may contract only with them for marketing such products, and which act provides that said association shall not be deemed a conspiracy or an illegal combination or monopoly. The court stated:

"Connolly v. Union Sewer Pipe Co., 184 U. S. 540, is much relied upon. But there the circumstances differed radically from those here presented: and always to determine whether equal protection is denied, there must be consideration of the peculiar facts. Connolly resisted judgment for the purchase price of pipe upon the ground that the Union Company, the vendor belonged to a combination or trust forbidden by an Illinois statute. The statute defined a trust, made participation therein criminal, and directed that those who purchased articles from an offending member should not be held liable for the price. * * * The questioned statute (in Illinois) undertakes to protect sanctioned contracts against any interference—no one could lawfully do what the warehouse company did * * *

"It is stated without contradiction that co-

operative marketing statutes substantially like the one under review have been enacted by forty-two states. Congress has recognized the utility of cooperative associations among farmers in the Clayton Act, the Capper-Volstead Act, and the Cooperative Marketing Act. These statutes reveal widespread legislative approval of the plan for protecting scattered producers and advancing the public interest * * *

"The opinion generally accepted—and upon reasonable grounds, we think—is that the cooperative marketing statutes promote the common interest. The provisions for protecting the fundamental contracts against interference by outsiders are essential to the plan. This court has recognized as permissible some discrimination intended to encourage agriculture. American Sugar Refining Co. v. Louisiana, 179 U. S. 89; Cox v. Texas, 202 U. S. 446."

In *Kalb, et ux* v. *Fuerstein*, 60 Sup. Ct. 343, in upholding the constitutionality of the Frazier-Lempke Act, under the terms of which a farmer debter is alone given an opportunity to obtain a three-year moratorium in which to pay his debts, the court stated:

"Congress set up in the act an exclusive and easily accessible statutory means for rehabilitating distressed farmers who as victims of a general economic depression were without means to engage in formal court litigation * * *"

In *Clark* v. *Paul Gray, Inc.*, 59 S. Ct. 744-306 U. S. 583, the court, in 1939, upheld the statute of Cal-

ifornia known as the "California Caravan Act" passed in 1937, which exacted an aggregation of $15.00 in fees for each automobile driven into the state which was operated on its own wheels or in tow of the motor vehicle for the purpose of selling or offering the same for sale within or without the state.

The statute excepted from its operation vehicles moving wholly within either of two zones, fixed by the legislature, which are approximately the northern and the southern part of the state. The court in its opinion stated:

> "Appellees * * * contention is that the statute discriminates between automobiles transported into the state singly and those similarly transported intra zone, for which no fee is charged, and also that the statute discriminates between those cars driven by appellees in caravan and those similarly driven wholly within either of the state zones, for which no fee is charged. * * *
>
> "The legislature, having made its classification by the establishment of zones, in the light of special conditions in the state, courts are not free to set aside its determination unless they can say that it was without any substantial basis. Carley and Hamilton v. Snook, 281 U. S. 66; Continental Baking Co. v. Woodring, 286 U. S. 352; Sproles v. Benford, 286 U. S. 374; Hicklin v. Coney, 290 U. S. 169; Aero Mayflower Transit Co. v. Public Service Commission, 295 U. S. 285."

In *Mulford* v. *Smith*, 307 U. S. 38, 59 S. Ct. 648,

the Supreme Court, in upholding the constitutionality of the Agricultural Adjustment Act of 1938 as applied to the tobacco industry, stated:

> "Section 311 of said Act is a finding by the Congress that the marketing of tobacco is a basic industry which directly affects industry and farm commerce; that stable conditions in such marketing are necessary to the general welfare; that tobacco is sold on a national market and it and its products move almost or wholly in interstate and foreign commerce; that without federal assistance the farmers are unable to bring about orderly marketing with the consequences that abnormal excessive supplies are produced and dumped indiscriminately on the national market; that this disorderly marketing of excess supplies burdens and obstructs interstate and foreign commerce, causes reduction in prices and consequent injury to commerce, creates disparity between the prices of tobacco in interstate and foreign commerce and the prices of industrial products in such commerce, and diminishes the volume of interstate commerce in industrial products; and that the establishment of quotas as provided by the Act is necessary and appropriate to promote, foster, and obtain an orderly flow of tobacco in interstate and foreign commerce * * * "

In *H. P. Welch Co.* v. *State of New Hampshire*, 306 U. S. 79, 59 Sup. Ct. 438, the Supreme Court held constitutional a statute which declared it to be unlawful for any driver or operator of motor vehicles for transportation of property to be on duty continuously for more than twelve hours, which ex-

empted from its provisions those "who haul or use their trucks for transporting products of their own manufacture or labor, and motor vehicles not principally engaged in the transportation of property for hire or operating exclusively in a city or town, or within ten miles of its limits, or beyond the ten-mile limits, or not more than two trips in thirty days." The court stated:

> "We are of the opinion that for reasons given above, those stated by the State Supreme Court in this State and by this court in Dixie-Ohio Express Co. v. Georgia Commission, 306 U. S. 72, 59 S. Ct. 435, decided this day, the classification in question does not conflict with the rule of equal protection."

In *Dixie-Ohio Express Co.* v. *State Revenue Commission*, 306 U. S. 72, 59 S. Ct. 435, the Supreme Court upheld a statute of the State of Georgia, which required operators of motor trucks for hire to pay a much larger fee than it did of those who operated their trucks not for hire, the court stated:

> "(9) Is the Act repugnant to the equal protection clause? Appellant insists that it is because of the higher taxes imposed on those who haul for hire. But it fails to show lack of facts sufficient to justify the discrimination. In the absence of proof to the contrary, it is to be assumed that the use of the roads by one hauling not for hire is generally limited to transportation of his own property as an incident to his occupation or business and that it is substantially less than that of one who is engaged

in the business of common carrier thereon for hire. As hauling not for hire is likely to be occasional and accessory and as hauling for hire is a business, the success of which depends on the loading of the vehicles used and mileage made by them, the classification complained of may not be held arbitrary or without reasonable foundation. Morf v. Bingaman, 298 U. S. 407; Aero Mayflower Transit Co. v. Georgia Commission, 295 U. S. 285; Hicklin v. Coney, 290 U. S. 169; Continental Baking Co. v. Woodring, 286 U. S. 352; Bradley v. Public Utility Commission, 289 U. S. 92; Alward v. Johnson, 282 U. S. 509; Bekins Van Lines v. Riley, 280 U. S. 80; Packard v. Banton, 264 U. S. 140. Appellant's contention that the Act violates the equal protection clause is without merit."

In *Silver* v. *Silver*, 280 U. S. 117, the Supreme Court upheld the statute of Connecticut, which provided that no person transported by the owner of a motor vehicle as his guest without payment of a fee should have a cause of action for damages against such owner, unless such accident was intentional on the part of the driver or was caused by his heedless or his reckless disregard of the rights of others. The statute was attacked on the ground that the exemption applied only to motor vehicles and not to other classes of vehicles, such as carriages, railroads, etc. The court stated:

"Granted that the liability to be imposed upon those who operate any kind of vehicle for the benefit of a mere guest or licensee is an appropriate subject of legislative restriction, there is no constitutional requirement that a regula-

tion, in other respects permissible, must reach every class to which it might be applied—that the legislature must be held rigidly to the choice of regulating all or none. (cites authorities)

"In this day of almost universal highway transportation by motor car, we cannot say that abuses originating in the multiplicity of suits growing out of their gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the legislature may regard as an evil, as to justify legislation aimed at it, even though some abuses may not be hit. (cites authorities) It is enough that the present statute strikes at the evil where it is felt, and reaches the class of cases where it most frequently occurs."

In *International Harvester Co.* v. *Missouri, ex rel Attorney General*, 234 U. S. 199, the Supreme Court upheld the anti-trust statute of Missouri which exempted therefrom persons selling labor and service and exempted purchases of the products sold. The court stated:

"The foundation of our decision is, of course, the power of classification which a legislature may exercise, and the cases we have cited, as well as others which may be cited demonstrate that some latitude must be allowed the legislative judgment in selecting the 'basis of community.' We have said that it must be palpably arbitrary to authorize a judicial review of it, and that it cannot be disturbed by the courts 'unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves

> untouched.' Missouri, Kansas & Texas Ry. Co. v. May, 194 U. S. 267; Williams v. Arkansas, 217 U. S. 79; Watson v. Maryland, 218 U. S. 173 * * *
>
> "It is said that the statute as construed by the Supreme Court of the State comes within our ruling in Connally v. Union Sewer Pipe Co., 184 U. S. 540. But we do not think so."

The American Sugar Refining Co. v. *Louisiana*, 179 U. S. 89, involved a statute of Louisiana which levied a tax on parties carrying on the business of refining sugar and molasses, but exempted therefrom "planters and farmers grinding and refining their own sugar and molasses."

In upholding said statute against the claim that the exemption was an unjust discrimination, the court said:

> "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. * * *
>
> "The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws."

The Circuit Court of Appeals for the Second Circuit in *Weed* v. *Lockwood*, (1920) 266 Fed. 785, in upholding the Lever Act passed by Congress, which

prohibited the hoarding of food and other products but exempted from its provisions farmers and stockmen with respect to the farm products raised or produced by them, stated:

"It is contended that the statute in question is an arbitrary class legislation, and therefore in violation of the constitution Sec. 4 (of the Act) provides:

" 'Provided, that this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the *farm products produced or raised upon land owned, leased, or cultivated by him.*' (Italics ours)

"It is argued that farmers, gardeners, ranchmen, dairymen, or stockmen, or other agriculturists, with respect to other farm products, may make unjust and unreasonable rates and charges with impunity, but that, if the miners of coal, manufacturers and dealers in farm machinery and equipment, refiners of sugar, or dealers in food products do so, they violate the act. Therefore there is a discrimination of class. The power of classification has had a very broad range. In Atchison, Topeka & Santa Fe R. R. v. Matthews, 174 U. S. 96; 19 Sup. Ct. 609; 43 L. Ed. 909, the court said:

" 'The very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality.'

"Whether it would have been better policy to have included the farmer or ranchman, or not to have made such a comprehensive classification as the statute does, is not within our province to decide. Whether the existing circumstances and the times call for such a rule of conduct as to exclude farmers from the purposes of the act was a matter for the Congress to decide. Congress could make this classification, and it be held not in contravention of the constitution. International Harvester Co. v. Missouri, 234 U. S. 199; 34 Sup. Ct. 859; 58 L. Ed. 1276; 52 L. R. A. (N. S.) 525.

"Some latitude must be allowed to legislative judgment in selecting the basis of community. It must be palpably arbitrary to authorize a judicial review of it, and it cannot be disturbed by the courts unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. M. K. & T. Ry. Co. v. May, 194 U. S. 267; Williams v. Arkansas, 217 U. S. 79.

"Here Congress has limited the exemption from the operation of the statute to farmers, gardeners, and agriculturists only with respect to *products of the land produced upon land owned, leased or cultivated by them.* (Italics ours) Congress may have had in mind the encouragement of the farmers to large production. It was essential to have full production from land in the emergency."

Appellant claims to get comfort out of the opinion rendered by the Supreme Court on December 4,

1939, in *United States of America* v. *Borden Company*, 60 Sup Ct. 182, where the defendants were charged with violation of the Sherman Anti-Trust Statutes. We think the opinion in said case strengthens the position of the State of Texas that the classification made in our anti-trust statutes which exempts "farm products and livestock in the hands of the original producer or raiser" is a reasonable and a rational classification.

In the Borden Company case the defendants who were distributors of milk, which included a number of corporations, the Pure Milk Association for Producing Milk, The Milk Wagon Drivers' Union, and certain public municipal officers and other parties were charged with having entered into a conspiracy for the purpose of fixing the retail price of milk. The defendants claimed to be protected under and by virtue of the Agricultural Marketing Agreement Act as passed by Congress. The Supreme Court held that said Act did not go to such length and that the defendants could not hide behind said Act if they were doing the things charged in the indictment. The trial court held that said Act was a bar to any prosecution. The Supreme Court in overruling the trial court in that respect stated:

> "We are of the opinion that this conclusion (that the Agricultural Marketing Act protected the defendant) is erroneous. No provision of that purport appears in the Agricultural Act. While effect is expressly given, as we shall see,

to agreements and orders which may validly be made by the Secretary of Agriculture, there is no suggestion that in their absence, and apart from such qualified authorization and such requirements as they contain, the commerce in agricultural commodities is stripped of the safeguards set up by the Anti-Trust Act and is left open to the restraints, however unreasonable, which conspiring producers, distributors and their allies may see fit to impose.

"An agreement made with the Secretary as a party, or an order made by him, or an arbitration award or agreement approved by him, pursuant to the authority conferred by the Agricultural Act and within the terms of the described immunity, would, of course, be a defense to a prosecution under the Sherman Act to the extent that the prosecution sought to penalize what was thus validly agreed upon or directed by the Secretary. Further than that the Agricultural Act does not go. * * *"

Appellant relies chiefly on the decision of this court in the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, decided thirty-eight years ago.

Since that decision, changed economic conditions have necessitated special legislation for agricultural producers and stock raisers, and by reason of this changed economic condition, Congress, as well as the legislatures of most states have passed a number of laws effecting only farmers and stock raisers, thereby showing it to be a public policy to recognize them as a separate class.

When the Connolly case was decided in 1902, the interests of the farmers were not represented. At that time the economic distinction between agriculturists and stock raisers, and other classes based upon the difference between individual production and group production, was not developed.

When the United States was drawn into the World War in 1917, Congress realized the fact that the farming and stock raising industry was an essential class of work that must be continued in order to feed the army. As a result thereof farmers and stock raisers were in many instances exempted from service in the army. Our nation, recognizing the fact that it is absolutely necessary for the farming and stock raising projects to be continued, have made special gifts and rewards to the farmers.

The Connolly case has frequently been cited in a vain endeavor to induce the courts to declare the standard laws passed by the various states which do classify farmers and stock raisers as a separate class as arbitrary and unreasonable, and the courts have uniformly held that the classifications giving the farmers a preference as a class are binding, legal and proper.

The Connolly case was an action by the Union Sewer Pipe Company to recover the purchase price of sewer pipe delivered to the defendants. The defendants admitted receiving the pipe and using it, and did not dispute the amount due. Their sole defense was that the Union Sewer Pipe Company

was a member of a combination contrary to the Sherman Anti-Trust Law and the anti-trust law of the State of Illinois. The court held that the contracts under which the pipe was delivered had nothing to do with the alleged combination, and that it would be clearly unjust to permit the defendants to escape the payment of the admitted purchase price of the pipe by the collateral pleading of the Sherman Anti-Trust Law, or the common law against trusts and monopolies.

There can be little question but that the actual decision in the Connolly case was fair and just as between the parties to that litigation.

However, it would be unfair and unjust to extend the language of that decision beyond the facts of the case and apply such language to a new and changed condition, which was not known or contemplated when the Connolly case was decided.

Under the Connolly decision this court was called upon to decide only the question as to whether a purchaser from a member of an anti-trust combination should be relieved from paying for the merchandise which he bought, and for which he agreed to pay. Connolly was attempting to take from the Union Sewer Pipe Line Company a large amount of its material in the way of pipe without paying therefor. Connolly was attempting to deprive the pipe line company of its goods and property without paying for same. He attempted to get something for nothing.

Under the Texas anti-trust law, which is under review, trust combines are prohibited, and a violation thereof is made a penal offense of the laws of Texas. Appellant is charged with having violated that law by attempting to control the price of beer. He seeks to be relieved from punishment for controlling the price of beer because he claims that, since "farm products and stock while in the hands of the original producer and raiser" are exempt from the provisions of said law, he should also be exempt. He does not claim to be either a farmer or stock raiser.

As pointed out in this brief, Congress, since the World War, has recognized farmers and stock men as a separate and distinct class in numerous instances. They were exempted from service in the army; their farm products were exempted under the Lever Act; they are exempted from the social security tax; they are authorized to make combinations in order to obtain a better price for their farm products and stock. The Agricultural Marketing Act has been passed for their special benefit. The Frazier-Lempke Act has been passed for their protection. Congress has made large appropriations to help the farmer and the stock raiser as a separate and distinct class. Practically every state in the union has passed cooperative marketing acts which apply alone to farmers, and these acts have been upheld by frequent decisions of this court. Almost every state in the union has passed separate and distinct acts to assist the farmer and the stock men in their rights for an existence. They are the

most needed class in our country because they supply the commodities which give actual life and vitality to the citizenship. No class of people in the nation has been recognized in as many ways and under and by as many laws as have the farmers and the stock raisers during the last twenty-five years. We submit that if farm products and live stock while in the hands of the farmers and stock raisers who produced or raised same is not a reasonable and a rational classification, then all the laws passed for their aid or their support and their salvation will fall, and the decisions of this court, as well as the decisions of the courts of last resort in the various states, would necessarily be overthrown.

We believe we have shown beyond question that farm products and live stock while in the hands of the producer or raiser is not only a reasonable and a rational classification under our present form of government, but that it is an essential and a distinct classification from all other classes in this country. Texas, has a vast domain of land which is suitable alone for stock raising, and another large area suited alone for farming. If the classification is reasonable and/or rational, then this case should be affirmed. If on the other hand, the classification is not reasonable and rational, then this law, as well as all other laws that have been passed by the various states and by Congress should be held invalid for said reason. If the farmer as a class is a reasonable and rational classification for the enactment of laws by Congress, then the farm pro-

ducts and live stock while in the hands of the producer or raiser thereof is a reasonable classification for the anti-trust laws of Texas.

Appellant seems to take the position that the Texas Anti-Trust Statute would permit farmers and stockmen to violate the anti-trust law at all times and under all conditions. Whether that would be a reasonable classification for the Legislature to make or not is not before the court because the law does not exempt them from the anti-trust law except while they are disposing of their farm products and stock which they have personally produced or raised. The law in question exempts from the criminal statutes only farm products and live stock while in the hands of those who produce or raise same. The Legislature of Texas evidently believed that the farmer and live stock raiser who produced farm products or raised stock should be relieved from any possible embarrassment or threatened prosecution by entering into any kind of a combination or marketing agreement through, under or by which they could obtain a better or more satisfactory price for their farm products and live stock.

While appellant states in his brief that the *Connolly* v. *The Union Sewer Pipe Line Co.* case has been cited more than 142 times (we do not know where he received his information) by the courts of the land, he does not cite any other case where the courts have held unconstitutional an act of Congress or any statute passed by a State Legislature which has exempted farmers or stockmen as a class from the pro-

visions of the law although during the past 20 years there have been many such laws passed. As illustrations we again refer to the Co-operative Marketing Acts passed and upheld by the Courts of more than 40 states—The Commodity-Exchange Act by Congress; The Packers and Stockyards Act by Congress; The Agricultural Adjustment Act by Congress; the Commerce and Trade Act by Congress; the Internal Revenue Act by Congress; the Bankhead-Jones Farm Tenant Act by Congress; the Capper-Volstead Act by Congress; the Social Security Act by Congress; the Frazier-Lempke Act by Congress; the Rural Electrification Act by Congress; the Emergency Mortgage Act by Congress, all of which classified the farmers and/or stockmen as a distinct class. To the contrary each of the above laws and acts have been held constitutional and farmers and/or stockmen have been held to be a reasonable classification for legislative purposes.

While the Connolly case has been often cited by the Courts, it has many times been distinguished, and this Court has never, so far as we have been able to find, since it was rendered, held that farmers or stockmen or farm products and livestock were not a reasonable or rational classification for Legislative enactments.

Shepard's Citator shows that this court has cited the Connally case in only 23 cases, which involved the reasonableness of class classification made by law-making bodies. This court upheld 17 of said laws and held that 6 contained unreasonable classifi-

cation. None of the laws held unconstitutional by reason of the classification referred to or in any way involved farmers or stockmen or farm products. The Connally case has been many times cited on other questions.

As early as 1906 this court in *Cox* v. *The State of Texas*, 202 U. S. 446, upheld a Texas statute almost identical with the Anti-trust Statute now under review. In the Cox case this court held the statute of Texas which required all those selling intoxicating liquors to execute bonds and operate their places of business under very close scrutiny and regulations, but which exempted therefrom "wines produced from grapes grown in this state while the same is in the hands of the producer or manufacturers thereof" was not unconstitutional because of said exemption.

There is a vast difference between farmers and livestock raisers who are producing the necessary food and meat to supply the necessities of life and those men like appellant who are combining their money, skill, time and brains to control the price of beer. The mere statement of the case shows there is a reasonable basis for the classification of "farm products and livestock while in the hands of the producer or raiser."

DECISIONS CITED BY APPELLANT

In most of the opinions of this court cited by appellant, the statutes of the states attacked because of an unreasonable classification were upheld.

In *American Sugar Refining Company* v. *Louisiana*, 179 U. S. 89, cited by appellant, the statute of Louisiana was upheld which exempted the raisers of sugar and molasses from the provisions of said act.

In *Barbier* v. *Connally*, 113 U. S. 27, cited by appellant, the Supreme Court upheld the act of California, which regulated the conduct of laundries.

In *Carroll* v. *Greenwich Insurance Company*, 119 U. S. 401, cited by appellant, the statute of Iowa regulating insurance agencies was upheld.

In *Citizens Telephone Company* v. *Fuller*, 229 U. S. 322, cited by appellant, the statute exempting from taxation small telephone plants in the State of Iowa was upheld.

In *Cornelius Billings* v. *Illinois*, 188 U. S. 97, cited by appellant, the inheritance tax law passed by that state was upheld.

In *Cox* v. *State of Texas*, 202 U. S. 446, cited by appellant, the Texas statute was upheld which exempted from the liquor law grapes and manufactured wine from grapes in the hands of the producer of the grapes.

In *Dominion Hotel Company* v. *Arizona*, 249 U. S. 265, cited by appellant, the law of Arizona, which exempted railroad restaurants from the law regu-

lating restaurants generally, was upheld as a valid classification.

In *Geer* v. *Connecticut*, 161 U. S. 519, cited by appellant, the bird law passed by the state of Connecticut was held a valid classification.

In *Hayes* v. *Missouri*, 120 U. S. 68, cited by appellant, the law of Missouri, regulating the challenge of jurors in the trial of criminal cases, was held valid as a reasonable classification.

In *Liberty Warehouse Company* v. *Burley, T. G. M. Association*, 276, U. S. 71, cited by appellant, the law passed by the state of Kentucky, regulating the sale of tobacco, was held valid.

In *Missouri* v. *Lewis*, 101 U. S. 22, cited by appellant, the law regulating appeals in certain cases in Missouri, was held valid as a reasonable classification.

In *Otis* v. *Parker*, 187 U. S. 606, cited by appellant, the act passed in the state of California, regulating the sale of stock, was held valid as a reasonable regulation.

In *Ozan Lumber Company* v. *Union County National Bank*, 207 U. S. 251, cited by appellant, the law of Arkansas, regulating the kind of note to be taken when patented goods were sold, was upheld as a valid regulation.

In *Patsone* v. *Commonwealth of Pennsylvania*, 232 U. S. 138, cited by appellant, the game law of Pennsylvania was held constitutional as being a reasonable classification.

In *H. P. Welch Company* v. *New Hampshire*, 306 U. S. 79, the law regulating drivers of motor buses was upheld as being a reasonable classification.

Appellant did not cite a single opinion from this court that held unconstitutional any act of Congress or statute of any legislature, classifying farmers and stockmen or farm products, save and except the Connally case.

The state of Texas deems it proper to call this court's attention to what it considers an unwarranted attack upon the fidelity and trustworthiness of the attorneys general of Texas as contained in appellant's brief so that the court may take such action as it desires relative thereto. The remark of which complaint is made is set out on page 19 of appellant's brief, and is the underscored portion of the following statement:

> "The owners of these ranches (in Texas) may agree that they will not sell their cattle for less than ten cents a pound. This agreement would be a violation of the Civil Anti-trust laws of Texas, and the ranchmen making this agreement, *provided the Attorney General of the State of Texas thought it not politically inexpedient*, could be subjected to such penalties as are prescribed by the Civil Anti-trust statutes."

This remark is not germane to any issue in the case, and casts an undeserved reflection upon the attorney generals of Texas, both past and present, and is a wholesale indictment against the men who may be in the future, as well as those who have been in the past, elevated to the high office of Attorney General of the Lone Star State.

The State of Texas prays that the judgment of the Court of Criminal Appeals of Texas in this case be in all things affirmed.

William A. Vinson, Charles I. Francis and Vinson, Elkins, Weems & Francis of Houston, Texas, counsel for appellant, have been furnished copies of this brief.

Respectfully submitted,

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MAY 31 1940
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 635

HERBERT TIGNER, *Appellant*,

v.

THE STATE OF TEXAS, *Appellee*

PETITION FOR REHEARING

Appeal From the Court of Criminal Appeals of the State of Texas

---

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Appeal From the Court of Criminal Appeals of the State of Texas

---

COMES NOW, HERBERT TIGNER, Petitioner in the above entitled cause, and presents this, his petition for rehearing thereof, and in support of such petition respectfully shows:

I.

This is a criminal case. It was decided by this Court on May 6, 1940. Petitioner was indicted for a conspiracy to fix

the retail price of beer. Title 19, Chapter 3 of the TEXAS PENAL CODE, condemning such conspiracies, specified that the law should not "apply to agricultural products or livestock in the hands of the producer or raiser." (Art. 1642, TEXAS PENAL CODE OF 1925). Petitioner challenged the validity of the entire statute and sought relief in the local court by habeas corpus. His contention, that such an exemption, granted by the Texas statute, violated the "Equal Protection Clause" of the Fourteenth Amendment to the CONSTITUTION OF THE UNITED STATES, was upheld by the Supreme Court of the United States in the case of CONNOLLY v. UNION SEWER PIPE COMPANY, 184 U.S. 540, wherein this Court held that an identical exemption in the same kind of statute, adopted by the State of Illinois, rendered such statute unconstitutional. The opinion of this Court, delivered by MR. JUSTICE FRANKFURTER, makes two important statements to which this Court's attention is directed as they form the basis for Petitioner's motion for rehearing, to wit:

(1) "The court below recognized that the exemption was identical with that deemed fatal to the Illinois statute involved in Connolly's case";

(2) "Connolly's case has been worn away by the erosion of time, and we are of the opinion that it is no longer controlling."

It is apparent to everyone that at the time Tigner committed the acts with which he was charged in the indictment, the law of the land, as announced by the Supreme Court of the United States in the CONNOLLY case, supra, and as declared by the Supreme Court of Texas in STATE v. SHIPPERS COMPRESS & WAREHOUSE COMPANY, 95 Tex. 603, 69 S.W. 58, was to the effect that this particular criminal statute,

containing the exemption above mentioned, was an invalid and unconstitutional Act, the violation of which would not subject a citizen to prosecution. This is undisputed.

Section 9 of Article I of the CONSTITUTION OF THE UNITED STATES declares "that no Bill of Attainder or Ex Post Facto Law shall be passed." Time and again this Court has announced in its opinions that it is the substance of the law which counts. The opinion of this Court, herein rendered, sanctions, as to this Petitioner, in substance and in effect, the passage of a Bill of Attainder or Ex Post Facto Law such as is prohibited by both the Constitutions of the United States and the State of Texas. (See Section 16, Art. I, of the CONSTITUTION OF THE STATE OF TEXAS.)

When was Appellant, Herbert Tigner, advised that "Connolly's case has been worn away by the erosion of time?" When was Appellant, Herbert Tigner, advised that the Supreme Court of the United States was "of the opinion that it (Connolly's case) was no longer controlling?" This information was imparted for the first time to him and to every other person in the United States by the decision of this Court on May 6, 1940. Prior to that time, as was pointed out by Appellant in his brief herein filed, the case of CONNOLLY v. UNION SEWER PIPE COMPANY, decided by the Supreme Court of the United States on March 10, 1902, had been cited one hundred forty-two (142) times in opinions rendered by the United States Appellate Courts; and in none of these opinions was there any intimation that the sound doctrine of constitutional law therein announced should be repudiated. For thirty-eight (38) years this decision had been a landmark in constitutional law. Tigner had a right to believe (because it was a fact) that it was still the law when on or about the 31st day of May, A. D. 1937, as alleged in the indictment (R. 1), he did those things set forth in the indictment which was filed on June 25, 1937. However persuasive the logician

may consider the pronouncements made in this Court's opinion on May 6, 1940, the fact remains that this Court has, in effect, sanctioned by this decision, a Bill of Attainder or Ex Post Facto Law contrary to the express provisions of both the Constitutions of the United States and the State of Texas. Under the CONNOLLY case, the Texas statute was invalid when it was adopted in 1911. When did it become valid? Clearly, not until this Court announced its decision on May 6, 1940. Certainly the rule of stare decisis should protect the rights of Petitioner as those rights existed on May 31, 1937. The Fourteenth Amendment to the Constitution, as interpreted at that time by the Supreme Court, was a shield for his conduct, and a withdrawal of that shield, under the circumstances of this case, appears to counsel to be a gross injustice.

When the Court of Appeals of Kentucky in the case of PAYNE v. CITY OF COVINGTON, 123 S.W. (2d) 1045 (decided December 16, 1938), felt impelled to overrule a previous decision of that Court, interpreting an important provision of the Constitution of the State of Kentucky, it said:

> "Therefore, in overruling our prior opinions and in declaring our disapproval of such erroneous interpretations herein dealt with, we do so with the express reservation that all rights heretofore created and accrued in favor of all persons interested, in any manner whatsoever, shall be preserved and the principles of this opinion will not apply to any transaction begun or in the course of completion, or finished before this opinion becomes final. * * * As a consequence of the conclusions we have reached the opinion in the cases of City of Providence v. Providence Electric Light Co., supra; Overall v. City of Madisonville, 125 Ky. 684, 102 S.W. 278, 31 Ky. Law Rep. 278, 12 L.R.A. (N.S.) 433; Carter v. Krueger & Son, 175 Ky. 399, 194 S.W. 553, and all others following the interpretations therein made are hereby ex-

pressly overruled; but with the reservation, supra, whereby the rights of all parties are preserved, and this opinion shall have a prospective effect only."

In that case, a just and fair Court concluded its opinion as follows:

> "However, the withholding of any retroactive effect of this opinion requires an affirmance of the judgment, since compliance is shown with the erroneous interpretations heretofore made. Wherefore, the judgment of the lower court is affirmed."

If this Court adheres to its decision with reference to the CONNOLLY case, it should do so in such a way as that the judgment of the Court shall not be retroactive. Any other course would work a grievous injustice upon Petitioner, as must be apparent to every member of this Honorable Court.

In the case of GREAT NORTHERN RAILWAY COMPANY v. SUNBURST OIL & REFINING COMPANY, 287 U.S. 358, 77 L. Ed. 360, the Supreme Court of the United States, in an opinion by MR. JUSTICE CARDOZA, reviewed a set of facts with respect to which the Supreme Court of the State of Montana pursued a similar course to that followed by the Kentucky Court of Appeals. In that case, JUSTICE CARDOZA said:

> "We have no occasion to consider whether this division in time of the effects of a decision is a sound or an unsound application of the doctrine of stare decisis as known to the common law. Sound or unsound, there is involved in it no denial of a right protected by the Federal Constitution. This is not a case where a court in overruling an earlier decision has given to the new ruling a retroactive bearing, and thereby has made invalid what was valid in the doing. Even that may often be done, though litigants not infrequently have argued to the contrary. * * * This is a case where a court has refused

to make its ruling retroactive, and the novel stand is taken that the Constitution of the United States is infringed by the refusal. * * * The choice for any State may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. The State of Montana has told us by the voice of her highest court that with these alternative methods open to her, her preference is for the first. In making this choice, she is declaring common law for those within her borders. The common law as administered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished, for intermediate transactions, by a decision overruling them. As applied to such transactions we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew. Accompanying the recognition is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule. If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the Constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process."

A like decision by the Supreme Court of Montana was made in the case of MONTANA HORSE PRODUCTS COMPANY v. GREAT NORTHERN RAILWAY COMPANY, 91 Montana 194, 7 Pac. (2d) 919. The principle for which Appellant argues in this motion for rehearing is also discussed in an article appearing in Volume 23, pages 32 and 33 of the AMERICAN JUDICATURE SOCIETY JOURNAL, Issue of June, 1939.

If the CONNOLLY case is overruled, as the Texas Court of Criminal Appeals has done, this Court should not permit

such a ruling to have a *retroactive effect* as such is a clear denial of due process of law as to Appellant, and sanctions what amounts to a retroactive or ex post facto law. There is no public necessity which justifies such a course of action, as Appellant's civil rights are of equal importance to the property rights protected by the decisions of the Kentucky and Montana Courts which have been approved, in effect, by this Court.

It seems to counsel for Petitioner that the time has come for this Court to determine whether or not the citizens of this country can rely upon the pronouncements of this Court as the established law of the land. Does the doctrine of stare decisis mean anything to this Court? Certainly it is a vital principle to litigants situated as is your Petitioner whose very liberty is jeopardized by reason of the fact that this Court has not recognized the rule of stare decisis as binding in this case. We can have no just quarrel with this Court in overruling long established and generally accepted principles of law if in overruling them the rights of litigants theretofore accrued are duly protected. Unless such is done the rights of our citizens, as fixed under the decisions of this Court, are subject to being blown away as leaves before the autumn winds. If this Court desires to overrule the CONNOLLY case and the principle of law therein announced because, as MR. JUSTICE FRANKFURTER colorfully states, it "has been worn away by the erosion of time," then such decision should preserve the rights of litigants which have accrued during the time when such a decision has been treated and considered as the law of this land. This decision was just as much a part of our law as any solemn act of the Legislature of Texas or Act of Congress. It was a clear pronouncement that the Fourteenth Amendment to the CONSTITUTION OF THE UNITED STATES forbade a State Legislature from making arbitrary classifications. JUSTICE HARLAN, in this opinion, stated:

> "We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

During the ensuing thirty-eight (38) years practically every Justice of the Supreme Court of the United Statets, including JUSTICE HOLMES, cited this decision with approval. The Texas statute under which Herbert Tigner was indicted was identical in substance and in form with the Statute of Illinois declared to be invalid by this decision. Tigner had the right to assume that the Texas Statute would receive a like construction, particularly when the decision of the Supreme Court of the United States had been fortified by like decisions of the highest court of the State of Texas. There was no way for him to know by reference to any pronouncement of this or any other court that the "processes of time" had eroded the principle of law announced in the CONNOLLY case. He had every right to believe, in the light of this decision and its oftime approval by this Court, that the statute of the State of Texas was a nullity. He is in no different situation from that which he would occupy if here had been no such statute of the State of Texas in existence during the year 1937, or any year prior thereto, and if the Legislature of the State of Texas in 1940 had passed a statute making criminal those acts which Herbert Tigner had performed in the year 1937. This Court would have promptly nullified such a statute. Such a law would have

clearly violated the letter and spirit of both State and Federal constitutions. Every member of this Honorable Court would have declared it a nullity because it would have clearly violated important constitutional prohibitions. Such being the case, counsel for Appellant respectfully submits, with all due deference, that this Court should not do indirectly that which the Constitution of the United States and the Constitution of the State of Texas declare cannot be done directly. It should not by the pronouncement of its decisions make laws retroactive; and this is exactly what this Court has done in this case unless it modifies its decision and prevents a retroactive effect, as was done by the highest Courts of Kentucky and Montana with the implied sanction and endorsement of the Supreme Court of the United States in the case of GREAT NORTHERN RAILWAY COMPANY v. SUNBURST OIL & REFINING COMPANY, supra.

Counsel for Petitioner realizes that whether or not this Court will adopt this course depends, as JUSTICE CARDOZA said, upon "the wisdom of this Court's philosophy." Petitioner stands before this Court as an humble litigant asking for the preservation of fundamental rights which are dear to every American citizen. The rights he claims are civil and personal rights protected by the Constitutions under which he lives. He can have no just cause for complaint if this Court would adopt the "wise philosophy," mentioned by JUSTICE CARDOZA, holding that the doctrine of the CONNOLLY case is overruled, and will not be applied to new situations as they arise under existing or future laws, but applying to Petitioner's case, the rule announced in the CONNOLLY case, as such was the law of the land during the year 1937 when this indictment was returned. If this Court overrules the CONNOLLY case and refuses to apply to the Texas statute the same yardstick of justice under the Constitution of the United States which it applied to the

Illinois Statute, then this Court has in effect sanctioned a retroactive or Ex Post Facto Law and become a party to the doing of that which our State and Federal Constitutions declare shall not be done. The interpretations of the Constitution of the United States by this Court, until expressly overruled, should be safe guides for every citizen to follow in his personal and business conduct. Unless this is true, no citizen can pursue his business with any assurance in the orderly processes of the law.

II.

This legislative exemption, granted to farmers and stockmen, cannot be justified on the grounds that "Texas may promote its policy of freedom for economic enterprise by utilizing the criminal law against various forms of combination and monopoly, but exclude from criminal punishment corresponding activities of agriculture." This is the fundamental position taken by the court in the opinion written by MR. JUSTICE FRANKFURTER. We would have no quarrel if the State of Texas, in fact, were undertaking by its law to promote a policy of economic freedom for its agricultural and livestock industries. Such is not the case. We but play with words when this statement is made in the face of the unchallenged facts presented by this record. The record reflects that the State of Texas by its law has made illegal ALL price fixing agreements,—not alone the price-fixing agreements of its citizens, who are engaged in the oil business or in the manufacturing business, but the price-fixing agreements of its farmers and ranchmen. *The State of Texas has not undertaken by its laws to promote the business of farming or ranching by exempting these businesses from the condemnation of price-fixing statutes.* On the contrary, the policy of the State of Texas, as exemplified by the valid acts of its Legislature,

upheld by the Supreme Court of the State of Texas (STATE v. STANDARD OIL COMPANY, ET AL., 107 S.W. (2d) 550), has made all price-fixing agreements illegal. However, the State of Texas has attempted by law to grant an exemption from criminal prosecution to farmers and stockmen. It has made a class selection for legislative purposes which has no reasonable relation to the object and purpose of the law. Under all of the decisions of this Court, until the day when MR. JUSTICE FRANKFURTER announced that "the processes of time had eroded the doctrine of the Connolly case," it was the settled law that arbitrary classifications—those which discriminated against some and favored others,—were illegal, under the "equal protection clause" of the Fourteenth Amendment to the CONSTITUTION OF THE UNITED STATES. This Amendment (said the prior cases) "requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." HAYES v. MISSOURI, 120 U.S. 68, 71. Under the Texas law, all citizens are *similarly situated* in that *they are prohibited* from making *price-fixing agreements*, but upon farmers and stockmen the law confers a *special favor*,—for no logical reason or purpose whatsoever,—in that this *particular class*, though similarly circumstanced with respect to the law, is exempt from criminal punishment. No more glaring example of special favor or dispensation can be imagined!

This Court but sets up a straw man for the purpose of demolishing it when it declares that the Legislature *has a right* to promote the the economic freedom of its agricultural and livestock industries. The Legislature *may have the right to do this*, but it has not attempted to exercise the right. We would not quarrel with a decision of this Court which declared this right where the State by its statutes *had sought*

to accomplish this objective. We do protest, however, against unwarranted and unjustified classifications, based upon occupation alone, under criminal laws, where one group of citizens can be sent to the penitentiary for doing an illegal act while another group of citizens doing the same illegal act is not subjected to the same penalty. This is certainly a denial of the Equal Protection Clause as guaranteed by the Fourteenth Amendment to the CONSTITUTION OF THE UNITED STATES because it is a denial of equal laws where no factual situation exists which justifies this disparity and injustice.

This Court's decision goes vastly beyond the CONNOLLY case. There, it might be said, the Legislature had in mind the purpose mentioned by MR. JUSTICE FRANKFURTER. Here, it is clear that the Legislature of Texas had no such purpose. A law which made it illegal to pursue certain political activities but exempt from prosecution all Democrats would be on a parity with this statute which this Court declares to be nondiscriminatory. Only a lullaby of words can harmonize this situation with the purpose and spirit of the Equal Protection Clause of the Fourteenth Amendment,—the true facts call for a condemnation of this law as a flagrant attempt to make "sauce for the goose a deadly poison for the gander."

JUSTICE FIELD, speaking for the Court in BARBIER v. CONNALLY, 113 U.S. 31, condemned this law when he said:

> "The Fourteenth Amendment * * * undoubtedly intended * * * that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

This pronouncement is clear. It is logical. It appeals to one's sense of justice and right. It represents the true spirit

in which the principle of equal protection of the law was written into the Constitution of the United States,—a principle for which many patriots gave their lives.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this motion for rehearing be granted; affirming that this petition is presented in good faith and not for delay.

Respectfully submitted,

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P 1

SUPREME COURT OF THE UNITED STATES.

No. 635.—October Term, 1939.

Herbert Tigner, Appellant,
vs.
The State of Texas.

Appeal from the Court of Criminal Appeals of Texas.

[May 6, 1940.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is an appeal under § 237(a) of the Judicial Code, as amended, 28 U. S. C. § 344, to review a judgment of the Court of Criminal Appeals of Texas sustaining the constitutionality of a Texas anti-trust law, and therefore upholding an indictment under it. Appellant was charged with participation in a conspiracy to fix the retail price of beer. Such a conspiracy is made a criminal offense by Title 19, Chapter 3, of the Texas Penal Code. Because the provisions of this law do not "apply to agricultural products or live stock in the hands of the producer or raiser", Art. 1642, Tigner challenged the validity of the entire statute and sought release in the local courts by *habeas corpus*. His claim has been rejected by the Texas Court of Criminal Appeals. 132 S. W. (2d) 885. Essentially his contention is that the exemption granted by the Texas statute falls within the condemnation of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, as offensive to "the equal protection of the laws" which the Fourteenth Amendment safeguards. If that case controls, appellant contends, the Texas Act cannot survive and he must go free.

The court below recognized that the exemption was identical with that deemed fatal to the Illinois statute involved in *Connolly's* case. But it felt that time and circumstances had drained that case of vitality, leaving it free to treat the exemption as an exercise of legislative discretion. A similar attitude has been reflected by the ~~Wisconsin Supreme Court~~ Supreme Court of Wisconsin, *Northern Wis. Cooperative Tobacco Pool* v. *Bekkedal*, 182 Wis. 571, 593, and appears to underlie much recent state and federal legislation. Dealing as we are with an appeal to

the Constitution, the *Connolly* case ought not to foreclose us from considering this exemption in its own setting.

The problem, in brief, is this: May Texas promote its policy of freedom for economic enterprise by utilizing the criminal law against various forms of combination and monopoly, but exclude from criminal punishment corresponding activities of agriculture?

Legislation, both state and federal, similar to that of Texas had its origin in fear of the concentration of industrial power following the Civil War. Law was invoked to buttress the traditional system of free competition, free markets and free enterprise. Pressure for this legislation came more particularly from those who as producers, as well as consumers, constituted the most dispersed economic groups.[1] These large sections of the population—those who labored with their hands and those who worked the soil—were as a matter of economic fact in a different relation to the community from that occupied by industrial combinations. Farmers were widely scattered and inured to habits of individualism; their economic fate was in large measure dependent upon contingencies beyond their control. In these circumstances, legislators may well have thought combinations of farmers and stockmen presented no threat to the community, or, at least, the threat was of a different order from that arising through combinations of industrialists and middlemen. At all events legislation like that of Texas rested on this view, curbing industrial and commercial combinations, and did not visit the same condemnation upon collaborative efforts by farmers and stockmen because the latter were felt to have a different economic significance.[2]

Since *Connolly's* case was decided, nearly forty years ago, an impressive legislative movement bears witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy. The states as well as the United States have sanctioned cooperative action by farmers; have restricted their amenability to the anti-trust laws;

[1] See 2 Beard, The Rise of American Civilization, pp. 254-343; Buck, The Granger Movement, *passim;* Hicks, The Populist Revolt, *passim;* Sheldon, Populism in the Old Dominion, pp. 17-20. Compare the letter of Mr. Justice Miller in Fairman, Mr. Justice Miller and the Supreme Court, p. 67. For the background of the Texas legislation see Finty, Anti-Trust Legislation in Texas, a collection of articles published in the Galveston News during the summer of 1916; Nutting, The Texas Anti-Trust Law: A Post-Mortem, 14 Tex. L. Rev. 293.

[2] See Seager and Gulick, Trust and Corporation Problems, pp. 149-95, 339-85.

have relieved their organizations from taxation. See, e. g., Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. § 291; Clayton Act, 38 Stat. 730, 731, 15 U. S. C. § 17; § 101(a) of the Internal Revenue Code, 53 Stat. 33. Such expressions of legislative policy have withstood challenge in the courts. *Liberty Warehouse Co.* v. *Tobacco Growers*, 276 U. S. 71.[3] Congress and the states have sometimes thought it necessary to control the supply and price of agricultural commodities within their respective spheres of jurisdiction, and the constitutional validity of these measures has been sustained. *Mulford* v. *Smith*, 307 U. S. 38; *United States* v. *Rock Royal Co-op.*, 307 U. S. 533; *Nebbia* v. *New York*, 291 U. S. 502.

At the core of all these enactments lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by anti-trust laws.[4] These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process. Certainly these are differences which may be acted upon by the lawmakers. The equality at which the "equal protection" clause aims is not a disembodied equality. The Fourteenth Amendment enjoins "the equal protection of the laws", and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. And so we conclude that to write into law the differences between agriculture and other economic pursuits was within the power of the Texas legislature. *Connolly's* case has been

[3] The state court cases are collected in United States *v.* Rock Royal Coop., 307 U. S. 533, 563-64. See Hanna, Law of Cooperative Marketing Associations, pp. 26-111. Compare German Alliance Ins. Co. *v.* Kansas, 233 U. S. 389, 418; International Harvester Co. *v.* Missouri, 234 U. S. 199; Aero Transit Co. *v.* Georgia Comm'n, 295 U. S. 285.

[4] See, for instance, the findings and declarations of policy embodied in the Agricultural Adjustment Act of 1938, 52 Stat. 31. Compare Seager and Gulick, *op. cit. supra*, note 2, pp. 322-23; Black, Agricultural Reform in the United States, pp. 1-61, 337-49; Nourse, Davis and Black, Three Years of the Agricultural Adjustment Administration, *passim*; Nourse, Marketing Agreements Under the A.A.A., pp. 315-49. Compare, as to railroad and express consolidations, § 5(8) of the Interstate Commerce Act as amended, 41 Stat. 456, 482, 49 U. S. C. § 5(8); as to bituminous coal, see § 4, I (d) of the Bituminous Coal Conservation Act of 1937, 50 Stat. 72, 77.

worn away by the erosion of time, and we are of opinion that it is no longer controlling.

Another feature of Texas anti-trust legislation is relied on by Tigner to invalidate the criminal statute under which he is being prosecuted. Beginning with the first enactment in 1894, the Texas anti-trust laws have had a complicated and checkered history. At present there are two statutes directed at combination and monopoly; the one under which Tigner was indicted, and another, subjecting to civil penalties the same conduct at which the challenged criminal law is aimed. Title 126, Revised Civil Statutes. From such civil proceedings, which the Attorney General initiates, no exemption is given to farmers and stockmen. Appellant urges that the divergence between civil and criminal laws relating to the same conduct undermines the validity of the exemption in the criminal statute and thus invalidates the whole of it. This argument is but a minor variation on appellant's main theme. It amounts to a claim that differences substantial enough to permit substantive differentiation in formulating legislative policy do not permit differentiation as to remedy.

How to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems. Whether proscribed conduct is to be deterred by *qui tam* action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice. Judgment on the deterrent effect of the various weapons in the armory of the law can lay little claim to scientific basis. Such judgment as yet is largely a prophecy based on meager and uninterpreted experience. How empiric the process is of adjusting remedy to policy, is shown by the history of anti-trust laws in Texas and elsewhere. The Sherman Law originally employed the injunction at the suit of the government, private action for triple damages, criminal prosecution and forfeiture. Later the injunction was made available to private suitors.[5] In the case of combinations of common carriers the Sherman Law is qualified by the Interstate Commerce Act, *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156, and, in the case of shipping combinations, by the Merchant Marine Act,

[5] See the Sherman Law, as amended, and supplementary enactments, in 15 U. S. C. §§ 1, 2, 4, 6, 9, 11, 15, 16, 21, 23, 25, 26.

U. S. Nav. Co. v. *Cunard S.S. Co.*, 284 U. S. 474. In its own groping efforts to deal with the problem of monopoly, the Texas legislature has in the course of nearly half a century invoked a dozen remedies.[6] When Iowa superimposed upon its general anti-trust law an additional penalty in the case of fire insurance combinations, this Court sustained the validity of the statute. *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401.

Legislation concerning economic combinations presents peculiar difficulties in the fashioning of remedies. The sensitiveness of the economic mechanism, the risks of introducing new evils in trying to stamp out old, familiar ones, the difficulties of proof within the conventional modes of procedure, the effect of shifting tides of public opinion—these and many other subtle factors must influence legislative choice. Moreover, the whole problem of deterrence is related to still wider considerations affecting the temper of the community in which law operates. The traditions of a society, the habits of obedience to law, the effectiveness of the law-enforcing agencies, are all peculiarly matters of time and place. They are thus matters within legislative competence. To say that the legislature of Texas must give to farmers complete immunity or none at all, is to say that judgment on these vexing issues precludes the view that, while the dangers from combinations of farmers and stockmen are so tenuous that civil remedies suffice to secure deterrence, they are substantial enough not to warrant entire disregard. We hold otherwise. Here, again, we must be mindful not of abstract equivalents of conduct, but of conduct in the context of actuality. Differences that permit substantive differentiations also permit differentiations of remedy. We find no constitutional bar against excluding farmers and stockmen from the criminal statute against combination and monopoly, and so holding, we conclude that there was likewise no bar against making the exemption partial rather than complete.

Affirmed.

Mr. Justice McREYNOLDS is of opinion that the judgment below should be reversed.

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[6] See Nutting, *op. cit. supra*, note 1, pp. 296-97. For the remedies now prevailing, see Texas Penal Code, Art. 1635, 1637, 1638; Revised Civil Statutes, Art. 7428-7437.